No. 04-848

Title: Barbara Dolan, Petitioner
v.
United States Postal Service, et al.

Docketed: December 22, 2004
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (03-1840)
Decision Date: August 2, 2004

**Questions Presented**

| Date | Proceedings and Orders |
|---|---|
| Nov 1 2004 | Petition for a writ of certiorari filed. (Response due January 21, 2005) |
| Jan 13 2005 | Order extending time to file response to petition to and including February 22, 2005. |
| Feb 11 2005 | Order further extending time to file response to petition to and including March 24, 2005. |
| Mar 24 2005 | Brief of respondents United States Postal Service, et al. in opposition filed. |
| Apr 6 2005 | DISTRIBUTED for Conference of April 22, 2005. |
| Apr 25 2005 | Petition GRANTED. |
| May 17 2005 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 14, 2005. |
| May 20 2005 | Motion to dispense with printing the joint appendix filed by petitioner. |
| Jun 13 2005 | Motion to dispense with printing the joint appendix filed by petitioner GRANTED. |
| Jul 12 2005 | Brief of petitioner Barbara Dolan filed. |
| Jul 14 2005 | Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed. |
| Jul 20 2005 | SET FOR ARGUMENT on November 7, 2005. |
| Aug 5 2005 | Extension of time within which to file the respondents' brief on the merits to and including September 15, 2005. |
| Sep 15 2005 | Brief of respondents United States Postal Service, et al. filed. (Distributed) |
| Sep 26 2005 | Record received from U.S.C.A. for 3rd Circuit. (1 envelope) |
| Oct 19 2005 | Reply of petitioner Barbara Dolan filed. (Distributed) |
| Nov 7 2005 | Argued. For petitioners: James R. Radmore, Philadelphia, Pa. For respondents: Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. |

(1)

Supreme Court, U.S.
FILED

04-848 NOV 1 - 2004

OFFICE OF THE CLERK

DOCKET NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

---

**BARBARA DOLAN**
**Petitioner**

**v.**

**UNITED STATES OF AMERICA**
**and THE UNITED STATES POSTAL SERVICE**
**Respondents**

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

# PETITION FOR WRIT OF CERTIORARI

---

**JAMES R. RADMORE, ESQUIRE**
**LAW OFFICE OF JAMES R. RADMORE, PC**
**TWO PENN CENTER, SUITE 312**
**1500 JFK BOULEVARD**
**PHILADELPHIA, PA 19102**
**ATTORNEY FOR PETITIONERS AND COUNSEL OF RECORD**
**(215) 568-9900**
**FAX (215) 568-4546**

## QUESTION PRESENTED FOR REVIEW

1. Does not this case - which involved a determination of whether the district court had jurisdiction over the claim of plaintiff when her injury was caused by the negligent placement of mail at the place of delivery - call for an exercise of this Courts supervisory power where there is a dispute between the circuits of the Court of Appeals as to whether the exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (b) barred this lawsuit and where the Third Circuit narrowly construed the Act?

(Answered in the negative by the Court below)

## THE PARTIES TO THE PROCEEDING

Barbara Dolan
Michael Dolan
308 Tyson Avenue
Glenside, PA 19038
Petitioners

United States of America
Department of Justice
Room 5111
10th and Constitution Avenue NW
Washington, DC 20530
Respondent

The United States Postal Service
475 L'Enfant Plaza SW
Washington, DC 20260
Respondent

## CORPORATE DISCLOSURE STATEMENT

Plaintiff is not a corporation



## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review. . . . . | i |
| The Parties to the Proceeding . . . . . | ii |
| Corporate Disclosure Statement . . . . . | ii |
| Table of Contents . . . . . | iii |
| Table of Authorities . . . . . | iv |
| Citations to the Orders and Opinions Below . . | 1 |
| Statement of Jurisdiction in this Court . . . . .. | 1 |
| Constitutional Provisions and Statutes Involved. . | 2 |
| STATEMENT OF THE CASE . . . . . | 3 |
| Basis for Federal Jurisdiction In the Court of First Instance . . . . . | 3 |
| 1. Procedural Background . . . . . | 3 |
| 2. The Material Facts - Not in Dispute . . | 4 |

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Third Circuit Court of Appeals incorrectly defined "transmission" as set forth in 28 U.S.C. § 2680 (b) and narrowly construed the Act in direct conflict with the Decision of the Second Circuit Court of Appeals and Congressional Intent . . . . . 5

CONCLUSION . . . . . 17

APPENDIX

The Order and Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, Mary A. McLaughlin, entered March 17, 2003, granting the Motion to Dismiss . . . . . 1a

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Scirica, Chief Judge, Roth and McKee, Circuit Judges, entered August 2, 2004, affirming the decision of the District Court . . 13a.



## TABLE OF AUTHORITIES

### Constitutional Provisions, Statutes and Rules:

Seventh Amendment of the Constitution . . 2

28 U.S.C. Section 1254(1) . . . . . 1

28 U.S.C. § 1346(b) . . . . . 3,4,7,14,15

28 U.S.C. § 2675 . . . . . 5

28 U.S.C. Section 2680 (b) . . . . . .2,3,4,6,7,8,9

Federal Rule of Civil Procedure 12 (b) (1) . 2,5

### Cases

**Anderson v Hayes Construction Co.**
243 NY 140, 147, 153 NE 28, 29-30 (1926) . . 9

**Birnbaum v. United States**.,
436 F. Supp. 967, 974 (E.D.N.Y.1977) . . . .. 11

**Kozak v United States**,
465 U.S. 848 (1984) . . . . . 13,16

**Lane v Pena**, 518 U.S. 187, 192 (1996) . . . . . 14

**NE Hub Partners, L.P. v. CNG Transmission Corp.**, 239 F.3d 333, 341 & n. 7 (3d Cir.2001) . 8

**Raila v United States**,
355 F. 3d 450 (2d Cir. 2004) . . . . . 7,10,12,13,16

**Robinson v United States**,
849 F. Supp. 799, 802 (S.D. Ga. 1994) . . . . . 10

**Suchomajcz v United States**,
465 F. Supp 474 (E.D. Pa. 1979) . . . . . 11

**United States v Yellow Cab Co**,,
340 U.S. 543, (1951) . . . . . 9

**Other Authorities**

Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3d Sess. 38 (1940) . . . . . 11

The Oxford University Press . . . . . 15

Webster's Ninth New Collegiate Dictionary . . 15



## CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE

The Order and Opinion of the United States District Court for the Eastern District Court for the Eastern District of Pennsylvania entered March 19, 2003 was not reported and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Scirica, Chief Judge, Roth and McKee, Circuit Judges, entered August 2, 2004, affirming the judgment of the District Court is reported at **Dolan v US Postal Service**, 377 F3d 285 (3rd Cir. 2004). The Judgment and Memorandum Opinion are set forth in the Appendix at page 13a.

## STATEMENT OF THE BASIS FOR THE JURISDICTION IN THIS COURT

The Judgment sought to be reviewed was entered by the Court of Appeals for the Third Circuit on August 2, 2004.

The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari the judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 12 (b) (1) provides:

b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
(1) lack of jurisdiction over the subject matter,

28 U.S.C. Section 2680 (b) provides:



The provisions of this chapter and section 1346 (b) of this title shall not apply to: ...

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

## STATEMENT OF THE CASE

### The basis for Federal Jurisdiction In The Court of First Instance

The district court had jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b).

### The Facts Material to Consideration of the Questions Involved

**1. Procedural Background**

This matter was commenced by Petitioners, Barbara Dolan and Michael Dolan, against the United States Postal Service and the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b). The appeal was taken on behalf of Petitioner, Barbara Dolan.

This case arose on August 25, 2001. This matter arose from Respondents' alleged negligence in placing the delivery of mail in such a way as to cause serious personal injuries to Petitioner, Barbara Dolan. Respondents filed a Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12 (b) (1). The Motion alleged that the exception to the waiver of immunity set forth at 28 U.S.C. § 2680 (b) barred Plaintiff's claim. Said exception states that the Act does not



apply to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters". Petitioner filed an Answer to the Motion to Dismiss,

On March 19, 2003, the District Court entered an Order granting the Motion to Dismiss. On August 2, 2004, the Third Circuit affirmed finding that in the context of delivering letters or postal matter, "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when it is delivered.

**2. The Material Facts - Not in Dispute**

The facts in this matter are simple and not in dispute. On or about August 25, 2001, Petitioner, Barbara Dolan, suffered serious personal injuries when she fell over certain packages that had been left on the porch of her property rather than the normal area for leaving of the mail. Petitioner's injuries included her wrists, large right pneumothorax, strain and sprain of the thoracic spine, strain and sprain of the lumbar spine, C4-5 and C5-6 circumferential disc bulges, L3-4 disc bulging, thoracic discogenic disease at T6-7 and T7-7 and lumbar discogenic disease.

In compliance with 28 U.S.C. § 2675, Petitioner filed an administrative claim prior to filing the Complaint. On or about April 18, 2002,

the claim was denied administratively and the Complaint was filed within 6 months of the denial.

The above facts are not at issue in this case. The matter is instead a question of law as to whether the exception to the waiver of immunity in the Federal Tort Claims Act set forth in 28 U.S.C.§ 2680 (b) was applicable to the actions of the Postal Service in this case.



## THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

**The Third Circuit Court of Appeals incorrectly defined "transmission" as set forth in 28 U.S.C. § 2680 (b) and narrowly construed the Act in direct conflict with the Decision of the Second Circuit Court of Appeals and Congressional Intent**

The Second Circuit in **Raila v United States**, 355 F.3d 450(2d Cir. 2004), held that the words "negligent transmission" are limited to the loss or miscarriage of postal material. In this matter, the Third Circuit disagreed and held that "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when it is delivered. The conflict between the holdings of the Circuits calls for the exercise of this Court's supervisory power.

The Federal Tort Claims Act, 28 U.S.C. § 1346 (b) waives the government's immunity from tort liability except in certain circumstances. Here Respondent has argued that the exception to the waiver set forth in 28 U.S.C. § 2680 (b) deprived the District Court of subject matter jurisdiction. This exception sets forth that the provisions of this Title shall not apply to "any claim arising out of the loss, miscarriage, or **negligent transmission of letters or postal matters**" (emphasis added).

Federal Rule of Civil Procedure 12 (b) (1) permits the lack of jurisdiction of the subject matter to be raised by Motion. Challenges to subject matter jurisdiction under Rule 12(b)(1) may be "facial" or "factual." Facial attacks, like this one, contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. **NE Hub Partners, L.P. v. CNG Transmission Corp.** 239 F.3d 333, 341 & n. 7 (3d Cir.2001). Therefore the issue before the District Court was whether, accepting the allegations in the Complaint as true, this Complaint should have survived Respondent's Motion

The Complaint alleged that Petitioner was lawfully on her premises when she was caused to slip, trip, stumble and/or fall by reason of a dangerous and hazardous condition created by Respondent in improperly placings letters, packages or periodicals on the porch of the said property (Complaint, Paragraph 7). The Complaint then enumerated specific acts of negligence allegedly committed by Respondent (Complaint, Paragraph 8). Plaintiff suffered serious and permanent injuries as a result of the alleged negligence including her wrists, large right pneumothorax, strain and sprain of the thoracic spine, strain and sprain of the lumbar spine, C4-5 and C5-6 circumferential disc bulges, L3-4 disc bulging, thoracic discogenic disease at T6-7 and T7-7 and lumbar discogenic disease. (Complaint, Paragraph 9). The Complaint then alleged that Petitioner was caused to expend large sums of



money to treat said injuries, that she has been prevented from her normal duties and occupation and has suffered great physical pain and mental anguish. (Complaint, Paragraphs 10-12).

The Federal Tort Claims Act waives the government's immunity from suit in sweeping language. As stated in **United States v Yellow Cab Co**,, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 2d 523 (1951), the immunity is definitely waived in favor of the injured person. At page 554, the Court said:

> "In argument before a number of District Courts, the government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional intent in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in **Anderson v Hayes Construction Co.** 243 NY 140, 147, 153 NE 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not about to add to its rigor by refinement of construction where consent has been announced"

Most governmental employees, if committing a similar act of negligence would not be immune from suit. The question therefore was, does the rationale

behind the exclusion set forth in §2680 (b) apply to an act such as alleged here? This question must be considered against the backdrop of the liberal reading of the Act.

Even prior to **Raila** and this matter there was no one definition of transmission of the mail. For example in **Robinson v United States**, 849 F. Supp. 799, 802 (S.D. Ga. 1994) transmission was defined as "when a postal patron deposits postal matter with the Postal Service and would end when the postal matter was delivered by the Postal Service to a third-party". However the District Court for the Eastern District of Pennsylvania in **Suchomajcz v United States**, 465 F. Supp 474 (E.D. Pa. 1979) limited negligent transmission of the mails to injury done to the package or letter while in transit.

The Court in **Suchomajcz** discussed the legislative history at length. At page 476 the Court writes:

> "However, an examination of the legislative history and Congressional intent behind the postal exception reveals that plaintiff's claim is not barred. As pointed out by Judge Weinstein from the Eastern District of New York, "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary,



> accepted operations of delivering millions of packages and letters each year." **Birnbaum v. United States**., 436 F. Supp. 967, 974 (E.D.N.Y.1977). A Justice Department official explained the rational behind the postal exception: Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay, the government could be sued for damages. Consequently, this provision was inserted.
> Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3d Sess. 38 (1940) (testimony of A. Holtzoff, Special Assistant to Attorney General of the United States). In previous testimony Mr. Holtzoff had commented that the theory behind the exceptions was to "exempt certain tort claims that would be difficult to defend, or in respect to which it would be unjust to make the government liable." Id. at 22.

The testimony of Mr. Holtzoff quoted in **Suchomajcz** is particularly instructive of the legislative purpose behind §2680 (b). The Postal

Service handles incalculable amounts of mail every day. Despite its best efforts and the most modern and sophisticated systems, mistakes occur, letters and packages are damaged or lost and people are in some way damaged by these events. To permit these events to be actionable would have a chilling effect to the delivery of mail, open the floodgates of litigation and have very real consequences. The exception was inserted to deal with loss or delay of the mail. Plaintiff asserts that, the common thread in the cases that should be subject to the exclusion is that it is impossible to prove negligence or for the government to defend itself.

In **Raila** at p. 121, the Court noted

"As the Supreme Court observed:
The specificity of 2680(b), in contrast with the generality of 2680 (c), suggests, if anything, that Congress intended the former to be *less* encompassing than the latter. The motivation for such an intent is not hard to find. One of the principal purposes of the [FTCA] was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault. In order to ensure that 2680(b), which governs torts committed by mailmen, did not



have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility – namely, "the loss, miscarriage, or negligent transmission of letters or postal matter" – thereby excluding, by implication, negligent handling of motor thereby excluding, by implication, negligent handling of motor vehicles. **Kosak v. United States**, 465 U.S. 848 at 855 (emphasis in original)

The Court in **Raila** noted that the government's interpretation can lead to absurd results. For example, a driver throws a package toward a home to which it is to be delivered and strikes and injures a pedestrian. The exception would apply whereas if the same driver was to strike a pedestrian with his vehicle while taking his eyes off the road, there would be liability.

The facts in **Raila** are virtually identical to those in the instant case. Plaintiff there was injured when she slipped on a package that had been placed immediately below her front door step by an employee of the USPS. The 2nd Circuit held that the postal matter exception, 28 U.S.C. § 2680 (b) does not bar plaintiff's claims.

The 3rd Circuit in the within case approached the matter differently stating that any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government. **Lane v Pena**, 518 U.S. 187, 192 (1996). Further, the Court held that the expansive language of the phrase "(a)ny claim arising out" evinced Congress's intent to broaden rather than limit the exception for "negligent transmission of letters or postal matter" Finally, the Court held that the "ordinary accepted operations" of the USPS must of necessity encompass more than merely the mechanical sorting and transfer of mail.

Petitioner asserts that the 2nd Circuit's opinion should be adopted by this Court. Postal workers cannot negligently leave the mail in a location where individuals can be injured just as they can't drive their postal vehicles in a negligent manner and escape liability. The Federal Tort Claims Act ("FTCA") describes one of the limited instances where the United States waives its sovereign immunity and consents to civil suit. *See* 28 U.S.C. § 1346(b),§§ 2671-80. Under the FTCA, a private party may sue the United States: "for personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b).



The 3rd Circuit based its decision on a narrow definition of the term "transmission". The Court pays lip service to the legislative history of the exclusion but doesn't discuss the testimony cited above. Rather it bases its decision on a narrow definition of the term "transmission". The definition of transmission is " the act, process or instance of transmitting." Webster's Ninth New Collegiate Dictionary at page 1254. The Oxford University Press defines the word "transmit" as "to cause to pass on from one place or person to another."

The Third Circuit agreed with the opinion of the District Court that: "In the context of delivering letters or postal matter, the process of conveying from one person to another starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter" This definition does not have any citation to any other case or authority. Petitioner asserts that this definition is not consistent with the intent of the Act and should not be followed by this Court.

This Court has noted in dicta that "[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." **Kozak** at 854. Plaintiff asserts that this is in fact a showing of how Congress wished the Act to be read and how the 2nd Circuit construed the exception in **Raila**. If there were clear negligent acts of the employee of the postal service, this

would not expose the United States to excessive or fraudulent claims.

As hereinbefore stated, the rationale for the exclusion is clear, rational and succinctly stated in the legislative history. It is easy to imagine the type of cases to which the Postal Service would be subjected to if this exclusion were not the law. What would stop someone who says they mailed their mortgage company their check and then finds themselves subject to foreclosure from suing the Postal Service as a result? What would stop a business who has an important document damaged in the mail from doing likewise? The lawsuits to which the Postal Service would be subject to for occurrences while the mail is in "transmission" is limited only by ones imagination. Negligently placing a package in such a way that one is caused to fall and suffer serious injuries is quite different and not what the exclusion was meant to prevent.

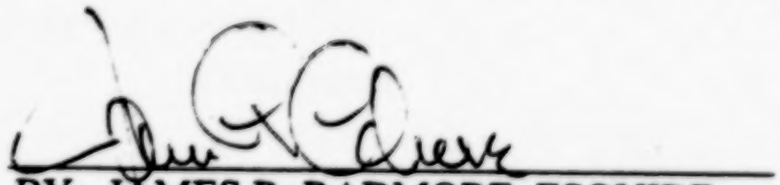
The issues herein are important and relate to significant issues worthy of this Court's attention. That two Circuits have thoroughly examined the issue and reached contradictory opinions indicates that this is a matter requiring this Court's supervisory powers and direction.



## CONCLUSION

WHEREFORE, Petitioner prays this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
LAW OFFICES OF JAMES R. RADMORE.P.C.



BY: JAMES R. RADMORE, ESQUIRE
*Attorney for Petitioner and Counsel of record*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BARBARA DOLAN et al., Plaintiffs | : | CIVIL ACTION |
| v. | : | |
| THE UNITED STATES POSTAL SERVICE et al. Defendants | : | NO. 02-7891 |

MEMORANDUM and ORDER

McLaughlin, J. March ____, 2003

The plaintiffs, Barbara and Michael Dolan have sued the United States and the United States Postal Service ("USPS") under the Federal Tort Claims Act ("FTCA"). Barbara Dolan alleges that she suffered injuries when she

---

1 In analyzing a motion to dismiss for lack of subjectmatter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must "treat the allegations of the complaint as true and afford the plaintiff[s] the favorable inferences to be drawn from the complaint." NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 (3d Cir. 2001) (citations omitted).

tripped and fell on mail that was negligently placed on a porch by a USPS employee. Her husband, Michael Dolan, alleges that he has been deprived of the consortium of his wife because of her injuries. Pending before the Court is the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction or in the alternative, for summary judgment. The Court will grant the motion.

The facts of this case, in the light most favorable to the plaintiffs, are as follows. 1 On August 25, 2001, Mrs. Dolan was on the premises of 308 Tyson Avenue. An employee of the USPS placed letters, packages, and periodicals on the porch of the residence. Mrs. Dolan slipped and fell on the mail. As a result of the fall, Mrs. Dolan suffered injuries. Compl. at ¶¶ 7-8.

The plaintiffs concede in their opposition to the



defendants' motion that the USPS is not a proper defendant under the FTCA. See Pl. Opp'n at 9. With respect to Mrs. Dolan's suit against the United States, the question is whether leaving the mail on the porch was a negligent transmission of the mail within the meaning of the FTCA exception that bars suits arising out of negligent transmission of the mail.

As a general rule, the United States cannot be sued unless Congress explicitly waives its sovereign immunity.The question of whether the government enjoys sovereign immunity is one of subject-matter jurisdiction. United States v. Bein, 214 F.3d 408, 412 (3d Cir. 2000).

The FTCA waives the government's sovereign immunity when government employees act negligently within the scope of their official duties. 28 U.S.C. § 1346(b); see Cestonaro v. United States, 211 F.3d 749, 753 (3d Cir. 2000). There are several enumerated exceptions to the FTCA's

waiver of sovereign immunity that are listed in 28 U.S.C. § 2680. The exception relevant in the present case is 28 U.S.C. § 2860(b), which states that the FTCA does not apply to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters."

In construing an exception to the FTCA's waiver of sovereign immunity, the proper role for a court is "to identify those circumstances which are within the words and reasons of the exception - no less and no more." Kosak v. United States, 465 U.S. 848, 854 n.9 (1984). The starting point for interpreting an exception to the FTCA is the actual language of the statute. After determining what the language at issue means, a court may also examine: (1) the context of the exception; (2) the legislative history of the exception; and (3) Congress's general purposes in creating exceptions to the FTCA. The general purposes of the FTCA exceptions are to



ensure that certain governmental activities not be disrupted by the threat of damages suits, to avoid exposure of the United States to excessive or fraudulent claims, and to not extend the FTCA to suits for which adequate remedies are already available. See id. at 853, 855-56, 858 & n.16.

Evidence outside of the actual language of an exception to the FTCA is not used to define the exception. Instead, a court may look to outside evidence to ensure that a court's construction of an exception is not undercut by any indication that Congress intended the exception to apply more narrowly. See id. at 858 n.16.

Whether the plaintiffs' suit is barred turns on the meaning of "negligent transmission" within the meaning of Section 2680(b). "Transmission" is the "act, process or instance of transmitting." Webster's Ninth New Collegiate Dictionary at 1254. "Transmit" means "to send or convey

from one person or place to another." See Black's Law Dictionary 1505 (7th ed. 1999). In the context of delivering letters or postal matter, the process of conveying from one person or place to another starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter.

Negligently placing mail on a porch falls squarely within the plain meaning of "negligent transmission" as that term is used in Section 2680(b). Transmission of the mail was not complete until the USPS employee placed the mail on the porch. The plaintiff's accident arose out of the USPS employee's alleged negligence in placing the mail on the porch. As such, Mrs. Dolan's suit is barred by Section 2680(b) because it arose out of negligent transmission of the mail.

There is no indication that Congress intended "negligent transmission" to be read more narrowly. The



context of "negligent transmission" is that it is part of a statutory provision eliminating the government's waiver of sovereign immunity for conduct related to certain postal operations. Nothing about placing "negligent transmission" within an exception to the FTCA's waiver of sovereign immunity for conduct related to certain postal operations undercuts the Court's interpretation of Section 2680(b).

As noted by other courts, the legislative history of Section 2680(b) shows that the purpose of the section was to prevent the courts from dealing with a landslide of lawsuits generated from unavoidable mishaps incident to the ordinary, accepted operations of the USPS. See Suchomajcz v. United States, 465 F. Supp. 474, 476 (E.D. Pa. 1979); Birnbaum v. United States, 436 F. Supp. 967, 974 (E.D.N.Y. 1977); see also Hearings Before Senate Committee on Judiciary on S. 2690, 76th Congress, 3d Sess. 38 (1940) (testimony of A.

Holtzoff, Special Assistant to the Attorney General of the United States). There is nothing out of the ordinary about a USPS employee delivering the mail or placing the mail on the porch instead of in the mailbox. Mrs. Dolan's accident was incident to the USPS employee placing the mail on the porch. Because the USPS employees do not monitor how mail they deliver is retrieved by patrons of the USPS, mishaps related to the retrieval of the mail are unavoidable.

Finding Mrs. Dolan's suit to be barred by Section 2680(b) is consistent with Congress's general purposes in creating FTCA exceptions. Allowing the government to be held liable for accidents stemming from the delivery of the mail would pose a threat of disrupting the governmental activity of ensuring that the millions of pieces of mail handled by the USPS are delivered efficiently. The type of claim brought by the plaintiff also has the potential to expose the



United States to liability for excessive or fraudulent claims as there are likely to be no witnesses to observe the events after the completion of delivery.

The plaintiffs have not cited, nor is the Court aware of, any cases interpreting Section 2680(b) to allow the type of claim brought by Mrs. Dolan. The only cases cited by the parties interpreting Section 2680(b) in the context of a person suing the government because of injuries suffered as a result of slipping on negligently placed letters or postal matter are Bono v. United States, 145 F. Supp. 2d 441 (D.N.J. 2001) and Hunt v. United States, No. 01-2462, 2002 WL 553736 (D. Kan. Apr. 4, 2002). In both cases, the courts interpreted Section 2680(b) to preclude the type of suit brought by the present plaintiff. The Court agrees with these other courts that the type of claim brought by Mrs. Dolan is barred under

Section 2680(b) because the claim arose out of negligent transmission of the mail.

The plaintiffs' reliance on Suchomajcz v. United States, 465 F. Supp. 474 (E.D. Pa. 1979), for a more restrictive interpretation of "negligent transmission" is misplaced. In Suchomajcz, six children were burned by firecracker assembly kits delivered by the USPS after the government had obtained several injunctions against the maker of the firecracker assembly kits enjoining him from sending the kits through the mail. The Suchomajcz plaintiffs' claim was not barred by the Section 2680(b) exception because it was an allegation that the USPS was negligent in not failing to stop the mail altogether, and not a claim that the USPS was negligent in the transmission of the mail. Id. at 476-77.

Unlike the plaintiffs in Suchomajcz, the plaintiffs in the present case are not arguing that the USPS was negligent in



failing to stop the mail from being delivered. Instead, the plaintiffs argue that the USPS was negligent in how it deliveredthe mail. Negligent delivery of the mail falls within the definition of negligent transmission of the mail.

Despite the plaintiffs' assertions to the contrary, construing Section 2680(b) to bar the plaintiffs' suit does not result in the purposes of the FTCA being frustrated. In Kosak, the Supreme Court noted that one of the principal purposes of the FTCA was to waive sovereign immunity for injuries resulting from automobile accidents in which employees of the USPS were at fault. To ensure that it did not bar a suit by a person injured in an auto accident where a USPS employee was at fault, Congress carefully delineated what type of suit Section 2680(b) barred. Because the negligent handling of motor vehicles was not listed in Section 2680(b), the Supreme Court reasoned that by implication a suit based on negligent

handling of a motor vehicle was not excepted. Kosak, 465 U.S. at 855. Negligent transmission of the mail, as opposed to negligent handling of a motor vehicle, was explicitly included in Section 2680(b). As negligent transmission of the mail includes negligent delivery of the mail, the plaintiffs' suit is barred by the words of Section 2680(b).

Mr. Dolan's loss of consortium claim is wholly derivative from his wife's tort claim. Because Barbara Dolan's claim is barred, Michael Dolan's wholly derivative loss of consortium claim is necessarily dismissed. See Murray v. Commercial Union Ins. Co., 782 F.2d 432, 437-38 (3d Cir.1986).

An appropriate order follows.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BARBARA DOLAN et al., Plaintiffs | : | CIVIL ACTION |
| v. | : | |
| THE UNITED STATES POSTAL SERVICE et al. Defendants | : | NO. 02-7891 |

ORDER

AND NOW, this day of March, 2003, upon consideration of the defendants' Motion to Dismiss or in the Alternative, for Summary Judgment (Docket No. 5), and the plaintiffs' opposition thereto, IT IS HEREBY ORDERED that the motion is GRANTED for the reasons set forth in a memorandum of today's date. This case is hereby dismissed.

BY THE COURT:

/s/ McClauglin, J.
MARY A. MCLAUGHLIN, J.

United States Court of Appeals,
Third Circuit.

Barbara DOLAN; Michael Dolan, W/H, Appellants
v.
THE UNITED STATES POSTAL SERVICE; United States of America.

**No. 03-1840.**

Submitted Under Third Circuit LAR 34.1(a) on Feb. 10, 2004.
Aug. 2, 2004.

**Background:** Postal customer brought suit against government under Federal Tort Claims Act (FTCA) seeking to recover for injuries suffered when she tripped over mail negligently left on her porch by mail carrier. The United States District Court for the Eastern District of Pennsylvania, Mary A. McLauglin, J., dismissed for lack of subject matter jurisdiction. Customer appealed.

**Holding:** The Court of Appeals, Roth, Circuit Judge, on issue of first impression in the Third Circuit, held that negligent transmission of mail, within exception to waiver of sovereign immunity under FTCA, included negligent delivery by postal carriers.
Affirmed.

Before SCIRICA, Chief Judge, ROTH and MCKEE, Circuit Judges.



OPINION

ROTH, Circuit Judge.

Appellant Barbara Dolan was injured allegedly as a result of mail negligently placed on her porch by a United States Postal Service (USPS) employee. Having properly exhausted her administrative remedies, Dolan filed a claim under the Federal Tort Claims Act (FTCA) in the United States District Court for the Eastern District of Pennsylvania. Citing 28 U.S.C. § 2680(b)' s exception to the FTCA for negligent transmission of the mail, the government filed a Fed.R.Civ.P. Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and the District Court granted it. Dolan appeals, arguing that § 2680(b)'s exception does not include immunity for the negligent delivery or placing of the mail. This is an issue of first impression in this Circuit After careful consideration, we conclude that the District Court was correct in its determination and will affirm.

## I. Factual and Procedural History

On August 25, 2001, Dolan fell over letters, packages and periodicals placed by a USPS employee on her porch. As a result of the fall, Dolan suffered serious injury.

In compliance with 28 U.S.C. § 2675 , Dolan filed an administrative claim prior to filing her FTCA complaint. This administrative claim, however, was denied on April 18, 2002. On October 15, 2002, Dolan filed a complaint under the FTCA against the United States and the USPS in the United

States District Court for the Eastern District of Pennsylvania. Her husband, Michael Dolan, also filed a FTCA claim for loss of consortium.

On February 7, 2003, the government filed its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The Dolans responded, conceding that the United States was the only appropriate defendant but otherwise opposing the motion.

On March 19, 2003, the District Court granted the government's motion to dismiss, holding that Barbara Dolan's claim was barred by 28 U.S.C. § 2680(b). The District Court also dismissed Michael Dolan's claim because it was derivative of his wife's claim.

On appeal, the Dolans concede that Michael Dolan did not timely exhaust his administrative remedies. Thus, the only the question before us is whether the District Court properly dismissed Barbara Dolan's claim for lack of subject matter jurisdiction.

## II. Jurisdiction and Standard of Review

Because the Dolans brought their claim under the FTCA, the District Court had jurisdiction pursuant to 28 U.S.C. § 1346(b). We have appellate jurisdiction under 28 U.S.C. § 1291. Our review is plenary where the District Court dismisses for lack of subject matter jurisdiction. *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir.2000).

## III. Discussion



"It is a fundamental principle of sovereign immunity that federal courts do not have jurisdiction over suits against the United States unless Congress, via a statute, expressly and unequivocally waives the United States' immunity to suit." *United States v. Bein*, 214 F.3d 408, 412 (3d Cir.2000) (citing *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). "[W]hen the Government does consent to be sued, 'the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction.' " *Id.* (quoting *United States v. Mottaz*, 476 U.S. 834, 841, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986)). "Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed, and any such waiver must be construed strictly in favor of the sovereign." *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)) (internal quotation marks omitted). The FTCA waives the government's sovereign immunity when government employees act negligently within the scope of their official duties. 28 U.S.C. § 1346(b).

At issue here is an exception to the FTCA which provides that this waiver shall not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters." 28 U.S.C. § 2680(b). Dolan contends that the words "negligent transmission" in § 2680(b) do not include a USPS employee's negligent placing of the mail. In essence, she invites us to read § 2680(b) as only providing the government immunity for mail lost, delayed or damaged in transit.

Relying on *United States v. Yellow Cab Co.*, 340 U.S. 543, 554, 71 S.Ct. 399, 95 L.Ed. 523 (1951), Dolan argues that, under the FTCA, immunity is generally waived in favor of the injured party. Dolan also cites § 2680(b)' s legislative history as discussed in *Suchomajcz v. United States*, 465 F.Supp. 474, 476 (E.D.Pa.1979), in support of her more narrow definition of "negligent transmission." She points out that the District Court in *Suchomajcz* noted that in passing § 2680(b) "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year." *Id.*, 465 F.Supp. at 476 (quoting *Birnbaum v. United States*, 436 F.Supp. 967, 974 (E.D.N.Y.1977)). Dolan maintains that this history indicates Congress only intended § 2680(b) to protect the government from claims resulting from the loss or delay of mail, not torts resulting from negligently placed mail. While she concedes that *Bono v. United States*, 145 F.Supp.2d 441 (D.N.J.2001), the only prior case in this Circuit to substantially address the facts and issue at hand, interpreted § 2680(b) to bar the type of suit she now brings, Dolan argues that both *Bono* court and the District Court in this case erred in reading the statutory definition of "transmission" to include negligent placing or delivery of the mail. Finally, she alleges that the FTCA's underlying objectives are not served by a broad definition of "negligent transmission." *See* *Kosak v. United States*, 465 U.S. 848, 858, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984).

While we note that the Second Circuit Court of Appeals recently held in *Raila v. United States*, 355 F.3d 118 (2d Cir.2004), that the words "negligent transmission" are limited



to the loss or miscarriage of postal material, we disagree with that holding. To the extent that "negligent transmission" is ambiguous at all, any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government. *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). Construing 2680(b) in such a way is made all the easier by the statute's expansive language. The phrase "[a]ny claim arising out" evinces Congress's intent to broaden rather than limit the exception for "negligent transmission of letters or postal matter." [FN1]

FN1. *Robinson v. United States*, 849 F.Supp. 799 (S.D.Ga.1994), reached a similar interpretation of § 2680(b)'s language. *Id.* at 802 (citing *Kosak*, 465 U.S. at 854, 104 S.Ct. 1519).

Moreover, § 2680(b)'s legislative history makes plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year. *Suchomajcz*, 465 F.Supp. at 476. Notwithstanding Dolan's arguments to the contrary, the USPS's "ordinary accepted operations" of necessity must encompass more than merely the mechanical sorting and transfer of the mail. Indeed, it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees.

We thus agree with the District Court that there is nothing out of the ordinary about a USPS employee delivering the mail or placing the mail on the porch instead of in the

mailbox. Dolan's accident was incidental to the USPS employee placing the mail on the porch. Because USPS employees do not monitor how the mail they deliver is retrieved by third-parties, mishaps related to the retrieval of the mail may be unavoidable.

We hold therefore that in the context of delivering letters or postal matter, "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter. Such an interpretation of § 2680(b) furthers the FTCA's underlying objectives, particularly those of ensuring that a key governmental activity will not be disrupted by damage suits and of limiting the exposure of United States to excessive or fraudulent claims. *See* *Kosak*, 465 U.S. at 858, 104 S.Ct. 1519.

## IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court.

(2)

Supreme Court, U.S.
FILED
MAR 24 2005
OFFICE OF THE CLERK

No. 04-848

# In the Supreme Court of the United States

BARBARA DOLAN, PETITIONER

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*

PETER D. KEISLER
*Assistant Attorney General*

ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether a cause of action for personal injury resulting from the negligent delivery of mail is a claim "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" that, under 28 U.S.C. 2680(b), is excepted from the government's waiver of sovereign immunity in the Federal Tort Claims Act.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 8 |


## TABLE OF AUTHORITIES


Cases:

| | |
|---|---|
| *Kosak* v. *United States*, 465 U.S. 848 (1984) | 5, 6 |
| *Lane* v. *Pena*, 518 U.S. 187 (1996) | 4 |
| *Raila* v. *United States*, 355 F.3d 118 (2d Cir. 2004) | 4, 7 |

Statute:

| | |
|---|---|
| Federal Tort Claims Act, 28 U.S.C. 2680(b) | 4, 5 |

Miscellaneous:

| | |
|---|---|
| *Black's Law Dictionary* (7th ed. 1999) | 5 |
| *Webster's Ninth New Collegiate Dictionary* (1987) | 5 |

# In the Supreme Court of the United States

No. 04-848

BARBARA DOLAN, PETITIONER

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-20a) is reported at 377 F.3d 285. The opinion of the district court (Pet. App. 1a-12a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 2004. The petition for a writ of certiorari was filed on November 1, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. According to the allegations in the complaint in this case, on August 25, 2001, petitioner fell over letters, packages, and periodicals that had been placed on her porch by a United States Postal Service (USPS) employee who was delivering mail to her house. As a result of her fall, petitioner suffered physical injury and

her husband suffered a loss of consortium. Petitioner and her husband subsequently filed a complaint under the Federal Tort Claims Act (FTCA) against the United States and USPS.* The government moved to dismiss the case on the ground that the court lacked jurisdiction; the government argued that the suit fell within 28 U.S.C. 2680(b), which excepts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the FTCA's waiver of sovereign immunity. Pet. App. 1a-3a, 15a-16a.

2. The district court granted the government's motion and dismissed the complaint. Pet. App. 1a-13a. The court observed that whether petitioner's suit is barred turns on the meaning of "negligent transmission" as it is used in 28 U.S.C. 2680(b). Pet. App. 5a. Examining dictionary definitions of the term "transmission," the court concluded that the term, "[i]n the context of delivering letters or postal matter," means "the process of conveying [letters] from one person or place to another [that] starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter." *Id.* at 5a-6a. In light of this definition, the court explained, "[n]egligently placing mail on a porch" falls "squarely within the plain meaning of 'negligent transmission' as that term is used in Section 2680(b)," because the "[t]ransmission of the mail was not complete until the USPS employee placed the mail on the porch." *Id.* at 6a.

The court rejected petitioner's argument that Section 2680(b) should be read narrowly to encompass only claims for damage to mail itself, observing that "[t]here

---

* Petitioner's husband has not petitioned this Court for review of the decision below.



is no indication that Congress intended 'negligent transmission' to be read more narrowly." Pet. App. 6a. In addition, the court reasoned that such a reading of Section 2680(b) is not "consistent with Congress's general purposes in creating FTCA exceptions"—to prevent disruption of government activity—because it would "threat[en]" to "disrupt[] the governmental activity of ensuring that * * * millions of pieces of mail * * * are delivered efficiently," and would "expose the United States to liability for excessive or fraudulent claims as there are likely to be no witnesses to observe the events after the completion of delivery." *Id.* at 8a-9a.

3. The court of appeals affirmed. Pet. App. 14a-20a. In the court of appeals' view, the "negligent transmission of letters or postal matter" described in Section 2680(b) is "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." Pet. App. 20a. The court explained that reading "transmission" to include the placement of mail in the course of delivery at its destination is consistent with Section 2680(b)'s generally "expansive language." *Id.* at 19a. The court noted in this regard that Congress's use of "[t]he phrase '[a]ny claim arising out of'" such conduct in Section 2680(b) "evinces Congress's intent to broaden rather than limit the exception." *Ibid.*

In addition, Section 2680(b)'s legislative history, the court observed, makes "plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year." Pet. App. 19a. In the court's view, it was "hard to imagine a more ordinary

accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.* Here, the court continued, petitioner's accident "was incidental to the USPS employee placing the mail on the porch. Because USPS employees do not monitor how the mail they deliver is retrieved by third-parties, mishaps related to the retrieval of the mail may be unavoidable." *Id.* at 20a. Finally, "[t]o the extent that 'negligent transmission' is ambiguous at all," the court concluded that "ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government." *Ibid.* (citing *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)).

## ARGUMENT

Petitioner contends (Pet. 15-16) that the court of appeals erred in holding that 28 U.S.C. 2680(b) bars claims under the Federal Tort Claims Act for personal injury allegedly caused by the negligent delivery of mail. In addition, petitioner argues that the decision below conflicts with a decision of the Second Circuit, *Raila* v. *United States*, 355 F.3d 118 (2004), which held that Section 2680(b) encompasses only claims for damage to mail itself. Pet. 11-15. The court of appeals, however, correctly interpreted Section 2680(b), and any narrow and nascent conflict between the decision below and *Raila* does not merit this Court's intervention. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly concluded that Section 2680(b) bars claims against the United States for the negligent placement of mail during delivery. Although petitioner faults the court of appeals for focus-



ing on the text of the exception and "bas[ing] its decision on a narrow definition of the term 'transmission'" (Pet. 15), this Court has observed with respect to the FTCA that "[t]he starting point" of any analysis "of * * * competing interpretations must, of course, be the language of [Section 2680]," because "the legislative purpose is expressed by the ordinary meaning of the words used." *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (internal quotation marks and citation omitted).

Section 2680(b) provides that the waiver of the United States' sovereign immunity under the FTCA does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). The term "transmission" is commonly understood to mean the "act, process or instance of transmitting," *Webster's Ninth New Collegiate Dictionary* 1254 (1987), and to "transmit," in turn, is understood to mean "to send or transfer (a thing) from one person or place to another," *Black's Law Dictionary* 1505 (7th ed. 1999).

As the court of appeals correctly observed, in the context of the delivery of mail, the "transmission of letters or postal matter" reasonably encompasses the placement of mail on the addressee's porch or in the addressee's mailbox. See Pet. App. 19a. That activity is part and parcel of USPS's function in conveying mail and is a unique aspect of postal service. Indeed, "it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.* For this reason, reading Section 2680(b) narrowly, to exclude claims for negligent delivery, would fail to protect the core delivery function of

the USPS, which Congress clearly meant to safeguard. See *ibid*.

Petitioner has not pointed to, and cannot point to, anything in the text of Section 2680(b) to support her argument that the exception narrowly applies only to claims for mishandled mail or damage to the mailed material itself, and not to claims for personal injury due to negligent mail delivery. To the contrary, as the court of appeals pointed out (Pet. App. 19a), Section 2680(b) applies to "[a]ny claim arising out of" negligent transmission, which manifests an intent to broaden, not narrow, the reach of the exception.

Petitioner's reliance on dictum in *Kosak* (Pet. 15-16) for the proposition that Section 2680(b) cannot be read to insulate USPS from delivery-related claims is misplaced. In *Kosak*, this Court suggested only that Section 2680(b) was more limited than other exceptions in Section 2680, and would not bar suits for activities that do not directly involve negligent handling of the mail itself, such as the negligent handling of a USPS delivery truck. See 465 U.S. at 855. This Court has never suggested that Section 2680(b) does not apply to claims that arise directly from the handling of the mail itself as part of the USPS's core mail-delivery activities.

There is, moreover, nothing unique to USPS or to the performance of postal services about driving a vehicle. By contrast, the actual placement of the mail to accomplish its delivery *is* a function unique to the performance of postal services. Application of the exception in Section 2680(b) to such conduct therefore comports with its purpose of protecting from tort litigation the ordinary functions of handling billions of pieces of mail each year in the vast USPS operation. See Pet. App. 19a.



2. In addition, the nascent and narrow split of authority petitioner identifies does not merit this Court's review. Only one circuit, besides the court of appeals in the decision below, has even considered whether the exception to the FTCA's waiver of sovereign immunity set out in Section 2680(b) applies to negligent placement of mail during its delivery. In *Raila* v. *United States*, 355 F.3d 118 (2004), the Second Circuit held that Section 2680(b) applies only to claims for "damages and delay of the postal material itself and consequential damages therefrom" and not damages "that result from a slip and fall on a package that was left in the wrong place." *Id*. at 121.

That narrow conflict does not merit this Court's review at this time. In neither *Raila* nor the case at hand did the parties seek rehearing en banc. In light of the nascency of the circuit conflict—the conflicting decisions were issued only months apart last year—and the absence of any petition for rehearing en banc in this case or *Raila*, the courts of appeals retain the ability to harmonize the circuit precedents and eliminate the conflict by sitting en banc.

Permitting further percolation of the question presented is particularly called for in this case, because the Second Circuit did not address the argument that the placement of mail on a porch or in a mailbox differs from activities like driving a mail truck in that the former is a core postal activity and is unique to the postal function. Further consideration by the courts of appeals of that argument could resolve the conflict of authority and provide additional analysis that could benefit this Court if review became warranted at a later date.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*

PETER D. KEISLER
*Assistant Attorney General*

ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
*Attorneys*

MARCH 2005

Supreme Court, U.S.
FILED
JUL 12 2005
OFFICE OF THE CLERK

No. 04-848

IN THE

# Supreme Court of the United States

BARBARA DOLAN,

*Petitioner,*

v.

UNITED STATES POSTAL SERVICE and the UNITED STATES OF AMERICA,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

## BRIEF FOR PETITIONER

MICHAEL T. KIRKPATRICK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JAMES R. RADMORE
*Counsel of Record*
LAW OFFICE OF JAMES R. RADMORE, PC
Two Penn Center, Suite 312
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 568-9900

JULY 2005

## QUESTION PRESENTED

Whether a claim for personal injury caused by the negligence of a United States Postal Service employee while delivering mail is barred by 28 U.S.C. § 2680(b), the exception to the government's waiver of sovereign immunity in the Federal Tort Claims Act for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 3

I. Compensating Claims for Personal Injury Caused by the Negligence of USPS Employees While Delivering Mail Is Consistent with the Text, Structure, and Purpose of the FTCA and Its Exceptions. ..... 4

A. The Text of the Postal Exception Supports a Narrow Construction. ..... 4

B. The Second Circuit's Narrow Construction of § 2680(b) Is Consistent with the Structure and Purpose of the FTCA, Its Exceptions, and this Court's Decision in *Kosak*. ..... 8



C. The Third Circuit Construed the Exception Broadly Based on a Rationale Rejected by this Court. ..... 13

II. The Legislative History of the Exception Shows That Congress Did Not Intend to Bar Claims for Personal Injuries Caused by the Negligence of USPS Employees While Transporting Mail. ..... 15

III. The Construction of the Statute Adopted Below Would Yield Absurd Results. ..... 19

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Cases**

*Block v. Neal*,
460 U.S. 289 (1983) ..... 14

*Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*,
532 U.S. 598 (2001) ..... 7

*Chicago, R.I. & P. Ry. Co. v. United States*,
220 F.2d 939 (7th Cir. 1955) ..... 7

*Fla. Power & Light Co. v. Lorion*,
470 U.S. 729 (1985) ..... 8

*Gutierrez de Martinez v. Lamagno*,
515 U.S. 417 (1995) ..... 11

*Jarecki v. G.D. Searle & Co.*,
367 U.S. 303 (1961) ..... 4

*Klein v. W. Union Tel. Co.*,
13 N.Y.S.2d 441 (App. Div. 1939) ..... 6

*Kosak v. United States*,
465 U.S. 848 (1984) ..... *passim*

*Molzof v. United States*,
502 U.S. 301 (1992) ..... 6, 10



*N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,
514 U.S. 645 (1995) ..... 8

*Raila v. United States*,
355 F.3d 118 (2d Cir. 2004) ..... *passim*

*Robinson v. Shell Oil Co.*,
519 U.S. 337 (1997) ..... 8

*Smith v. United States*,
507 U.S. 197 (1993) ..... 14

*Suchomajcz v. United States*,
465 F. Supp. 474 (E.D. Pa. 1979) ..... 7

*Twentier v. United States*,
109 F. Supp. 406 (Ct. Cl. 1953) ..... 12

*United States v. Acord*,
209 F.2d 709 (10th Cir. 1954) ..... 7

*United States v. Aetna Cas. & Sur. Co.*,
338 U.S. 366 (1949) ..... 14

*United States v. Nordic Vill., Inc.*,
503 U.S. 30 (1992) ..... 14

*United States ex rel. Midland Loan Fin. Co. v. Nat'l Sur. Corp.*,
309 U.S. 165 (1940) ..... 12

*U.S. Postal Serv. v. Council of Greenburgh Civil Assocs.*,
453 U.S. 114 (1981) ..... 11

*Wash. State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) ..... 4

*W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921) ..... 6

*W. Union Tel. Co. v. Priester*, 276 U.S. 252 (1928) ..... 6

**Statutes**

18 U.S.C. § 1725 ..... 11

28 U.S.C. § 1346(b)(1) ..... 2, 8

28 U.S.C. § 2402 ..... 11

28 U.S.C. § 2680(b) ..... *passim*

28 U.S.C. § 2680(c) ..... 8, 9

28 U.S.C. § 2680(e)(i) ..... 18, 19

28 U.S.C. § 2680(*l*) ..... 5

28 U.S.C. § 2680(m) ..... 5

**Historic Statutes and Regulations**

31 U.S.C. § 224c (1940) ..... 13

39 U.S.C. § 245 (1940 & Supp. V 1945) ..... 11



39 U.S.C. § 381 (1940) ..... 11

39 C.F.R. § 16.61 (1938) ..... 13

Postal Laws and Regulations pt. 44 (1948) ..... 11

Postal Laws and Regulations § 863 (1924) ..... 17

Postal Laws and Regulations § 1070 (1924) ..... 17

Fla. Rev. Gen. Stat. § 4383 (1919) ..... 6

Mass. Gen. Laws ch. 166, § 19 (tercentenary ed. 1931) ... 6

Mo. Rev. Stat § 5334 (1939) ..... 6

**Session Laws**

Civil Asset Forfeiture Act of 2000, Pub. L. No. 106-185, § 3(a), 114 Stat. 202 (2000) ..... 9

Legislative Reorganization Act of 1946, ch. 753, title IV, 60 Stat. 812 (1946) ..... 15

Legislative Reorganization Act of 1946, ch. 753, § 424(a), 60 Stat. 812 (1946) ..... 13

**Unenacted Legislation**

H.R. 17168, 71st Cong. (1931) ..... 16

H.R. 9285, 70th Cong. § 4(a)(1) (1929) ..... 15

S. 1912, 69th Cong. (1926) ..... 15

H.R. 8651, 69th Cong. § 8(a)(1) (1926) ..... 15, 16

**Legislative History**

S. Rep. 79-1400 (1946) ..... 18

H.R. Rep. 79-1287 (1945) ..... 18

S. Rep. 77-1196 (1942) ..... 18

H.R. Rep. 77-2245 (1942) ..... 18

H.R. Rep. 71-2800 (1931) ..... 16

H.R. Rep. 69-206 (1926) ..... 16

*Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. (1940) ..... 17

*General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong. (1932) ..... 17

**Miscellaneous**

*Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946* (1947) ..... 12

Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) ..... 19

O.R. McGuire, *Tort Claims Against the United States*, 19 Geo. L.J. 133 (1931) ..... 16



1 Thomas Atkins Street, *The Foundations of Legal Liability* (1906) ..... 6

## OPINIONS BELOW

The opinion of the court of appeals is reported at 377 F.3d 285 (3d Cir. 2004) and is reproduced in the appendix to the petition for a writ of certiorari (Cert. App.) at 14a. The unreported opinion of the district court is reproduced at Cert. App. 1a.

## JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of petitioner's complaint was entered on August 2, 2004. Cert. App. 14a. The petition for a writ of certiorari was filed on November 1, 2004, and granted on April 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides in relevant part:

> Subject to the provisions of [28 U.S.C. § 2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680 provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . .

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

## STATEMENT OF THE CASE

Petitioner Barbara Dolan suffered serious personal injuries when she fell over letters, packages, and periodicals that had been negligently left on her porch by a United States Postal Service (USPS) employee. Cert. App. 15a. After exhausting her administrative remedies, Mrs. Dolan filed suit against the United States under the Federal Tort Claims Act (FTCA).[1] The district court held that Mrs. Dolan's claim was barred by the exception to the FTCA for negligent transmission of mail, 28 U.S.C. § 2680(b), and dismissed the complaint for lack of subject matter jurisdiction. Cert. App. 2a, 13a. The court of appeals affirmed, concluding that § 2680(b) not only bars claims that arise when mail is lost, delayed, or damaged, but also bars claims for personal injuries caused by negligent acts of USPS employees while delivering mail. Cert. App. 20a. Although the court below acknowledged that its decision conflicts with *Raila v. United States*, 355 F.3d 118 (2d Cir. 2004), it reasoned that § 2680(b) should be construed in favor of protecting the government from lawsuits. Cert. App. 19a.

## SUMMARY OF THE ARGUMENT

The FTCA waives the government's immunity from suit when government employees act negligently while performing their jobs, 28 U.S.C. § 1346(b)(1), but the waiver does not

---

[1]Mrs. Dolan sued both the United States and the USPS, but she conceded that the United States is the only appropriate defendant. Cert. App. 16a.



apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. § 2680(b). Although the phrase "negligent transmission" may be susceptible to multiple interpretations when considered in isolation, the text, structure, purpose, and history of § 2680(b) demonstrate that it is intended to shield the government from liability when mail does not reach its appropriate destination on time and in good condition, but not to establish governmental immunity where a person is injured by the negligence of a USPS employee engaged in the delivery of mail. Moreover, the court below has interpreted § 2680(b) in a manner that would yield absurd results.

## ARGUMENT

There is no dispute that § 2680(b) precludes FTCA suits to recover money damages from the United States for harm that results when mail is lost, delayed, or damaged in transit. This case turns on whether use of the phrase "negligent transmission" in § 2680(b) expands the scope of the exception to bar all claims for personal injury caused by the carelessness of a USPS employee simply because the tortfeasor was delivering mail.

The court below held that use of the phrase "negligent transmission" renders the government immune from suit for any damages caused by the negligence of USPS employees while mail is in transit. Cert. App. 20a. In contrast, *Raila* held that the phrase refers only to negligence that results in loss of, or damage to, the mail itself. The Second Circuit came to the right conclusion. Although it may be possible in the abstract to ascribe different meanings to the words "negligent transmission," their meaning is clear when considered in the context of § 2680(b). Application of the ordinary tools of statutory construction demonstrates that Congress did not intend

§ 2680(b) to shield the government from liability when the carelessness of USPS employees causes injury to a person.

## I. Compensating Claims for Personal Injury Caused by the Negligence of USPS Employees While Delivering Mail Is Consistent with the Text, Structure, and Purpose of the FTCA and Its Exceptions.

### A. The Text of the Postal Exception Supports a Narrow Construction.

The text of § 2680(b) indicates that "negligent transmission" refers to damage, loss, or delay of mail and not injury to persons resulting from negligent acts that occur while mail is in transit. Because § 2680(b)'s use of the words "loss" and "miscarriage" "can only refer to the damages and delay of the postal material itself[,]" "negligent transmission" should also be read to refer solely to the mail "in keeping with the rule of *noscitur a sociis*." *Raila*, 355 F.3d at 120-21 (citations omitted); *see also Wash. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps.").

It is beyond question that Congress intended to allow at least some claims against the government arising from the negligent acts of USPS employees while transmitting mail, because the FTCA allows claims against the government for injuries sustained as a result of the negligent operation of motor vehicles by USPS employees, and whether the vehicle is carrying mail at the time of the accident is irrelevant.

> One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault. In order to ensure that § 2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, "the loss, miscarriage, or negligent transmission of letters or postal matter"—thereby excluding, by implication, negligent handling of motor vehicles.



*Kosak v. United States*, 465 U.S. 848, 855 (1984) (internal citation omitted); *see also Raila*, 355 F.3d at 121-22 ("The government does not contest that one of the primary purposes of the FTCA was to waive the sovereign immunity of the United States for accidents caused by the negligence of USPS employees driving postal vehicles—and that the postal matter exception was never intended to bar such claims.") (citing government's brief).

If Congress had intended § 2680(b) to have the sweeping breadth attributed to it by the court below, it could have simply excluded from the FTCA any claim arising from the activities of the USPS, just as it did with regard to the activities of the Tennessee Valley Authority and the Panama Canal Company. *See* 28 U.S.C. §§ 2680(*l*) and (m). Even if Congress had intended to exclude from FTCA coverage only claims resulting from the activities of USPS employees while engaged in transmitting mail, it could have explicitly said so. That Congress did not plainly exclude all such claims from the FTCA indicates that Congress intended a more narrow construction of § 2680(b).

Moreover, the term "negligent transmission" must be interpreted consistently with its historical use. Prior to the enactment of the FTCA, "negligent transmission" was a term of art used frequently in the context of suits against telegraph companies, *see* Thomas Atkins Street, *Negligent Transmission of Telegrams* in 1 *The Foundations of Legal Liability* (1906) at 435-56, and several states had statutes recognizing liability for "negligent transmission" of telegrams. *See, e.g.*, Fla. Rev. Gen. Stat. § 4383 (1919) (creating liability for "negligently fail[ing] promptly to transmit and deliver" telegrams); Mass. Gen. Laws ch. 166, § 19 (tercentenary ed. 1931) (creating liability on the part of telegraph companies for "negligence, or that of its agents, in transmitting" telegrams); Mo. Rev. Stat. § 5334 (1939) (creating liability for "negligence in transmitting" telegrams); *Klein v. W. Union Tel. Co.*, 13 N.Y.S.2d 441, 445 (App. Div. 1939) (noting defendant telegraph company "operates under statutes and rules of law subjecting it to penalties and damages for discrimination and negligent transmission of messages"). In the telegram context, "negligent transmission" referred to negligence that resulted in delays or errors in the telegrams themselves. *See, e.g.*, *W. Union Tel. Co. v. Priester*, 276 U.S. 252, 256 (1928) (considering a suit alleging negligence of telegraph company where, "[i]n the message as transmitted the word 'fifteen' was substituted for the word 'fifty.'"); *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921). The phrase "negligent transmission" did not refer to common-law negligence that resulted in physical injury. *See* Street, *supra*, at 436 (noting that negligent transmission of telegrams "does not take the form of physical hurt to the body or damage to property").

According to "[a] cardinal rule of statutory construction," in the "'absence of contrary direction,'" phrases with specialized legal meanings should be interpreted in accord



with those definitions, "'not as a departure from them.'" *Molzoff v. United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 615 (2001) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."). The Court has recognized that "[t]his rule carries particular force in interpreting the FTCA." *Molzoff*, 502 U.S. at 307 ("'Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.") (quoting *United States v. Neustadt*, 366 U.S. 696, 707 (1961)). Thus, "negligent transmission" should be given the same meaning as it had in the telegram context at the time the FTCA was enacted. "Typically, the negligent transmission of telegraph messages involved the inadvertent substitution of words which changed the meaning of the transcribed message between sender and receiver. Carrying this analysis over to the post office, negligent transmission becomes the alteration or injury to the package or letter while in transit." *Suchomajcz v. United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979) (citations omitted).

Significantly, in early FTCA cases arising from personal injuries caused by the negligence of USPS employees in throwing mail pouches from moving trains, the courts did not address, and the government apparently did not raise, the postal exception. *See, e.g., Chicago, R.I. & P. Ry. Co. v. United States*, 220 F.2d 939 (7th Cir. 1955); *see also United States v. Acord*, 209 F.2d 709 (10th Cir. 1954). These cases confirm that "negligent transmission" was interpreted consistently with its contemporaneous use in the telegram context.

Finally, use of the phrase "[a]ny claim arising out of" at the beginning of § 2680(b) does not "evince[] Congress's intent to broaden rather than limit the exception for 'negligent transmission of letters or postal matter,'" as found by the court below. Cert. App.19a. Rather, the phrase "[a]ny claim arising out of" simply extends the coverage of the exception to all consequential losses and damages flowing from the types of acts for which governmental immunity is retained. It sheds no light on the proper scope of "negligent transmission."

### B. The Second Circuit's Narrow Construction of § 2680(b) Is Consistent with the Structure and Purpose of the FTCA, Its Exceptions, and this Court's Decision in *Kosak*.

To the extent that § 2680(b) can be read in multiple ways, the Court should consider the structure and purpose of the statute and interpret the postal exception to fit harmoniously within the whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). In general, the FTCA waives sovereign immunity to provide relief to those injured by the tortious conduct of government employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). The Third Circuit's view of § 2680(b) would bar most if not all claims for personal injuries caused by the negligence of USPS employees because USPS employees are generally involved in the transmission of mail. *Raila*, 355 F.3d at 120. Such an expansive reading of the exception runs counter to the general purpose of the FTCA and cannot be squared with its structure.

In *Kosak*, the Court addressed whether the customs service exception to the FTCA, 28 U.S.C. § 2680(c), was broad



enough to shield the government from liability for injuries to detained property caused by the negligence of customs officials in handling it, or whether the exception covered only claims for damage caused by the detention itself.[2] 465 U.S. at 851-52. The Court found that the language of § 2680(c) was broad enough to cover claims arising from negligent handling or storage of detained property, in part because "[t]he specificity of [the postal exception of] § 2680(b), in contrast with the generality of § 2680(c), suggests, if anything, that Congress intended the former to be *less* encompassing than the latter." *Id.* at 855 (emphasis in original). Although the Court found that the plain language of § 2680(c) was broader than the language at issue here, *Kosak* does not suggest that even the customs exception would reach injuries other than those to property.

*Kosak* identified three rationales for the FTCA exceptions. *Id.* at 858. These three general purposes do not support the expansive reading of § 2680(b) adopted by the court below.

The first rationale for the FTCA exceptions is to ensure that certain governmental activities are not disrupted by the threat of damage suits. *Id.* Closely related is the second rationale—avoiding exposure to liability for excessive or fraudulent claims. *Id.* In the context of § 2680(b), these rationales support the view that the exception shields the government from liability for any damages that result when

---

[2]At the time of the decision in *Kosak*, 28 U.S.C. § 2680(c) excepted from the FTCA "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs[.]" This section was amended by the Civil Asset Forfeiture Act of 2000, Pub. L. No 106-185, § 3(a), 114 Stat. 202, 211 (2000).

*mail* is lost, damaged, or delayed, but they provide little support for the view that § 2680(b) shields the government from liability for injuries to *people* caused by the negligence of one engaged in making deliveries, just because they happen to be deliveries of mail.

The core function of the USPS is to deliver large quantities of mail at low cost. As a practical matter, the sheer volume of mail precludes the use of a system for tracking the whereabouts and condition of every piece of postal matter deposited with the USPS without the added cost of postal insurance or registration, and presents obvious proof problems in dealing with claims that mail was lost or damaged. If one could sue the government for lost or damaged mail, the systems required to reduce the volume of claims and potential for fraud would disrupt the core function of the USPS. This explains the application of the exception to claims for lost or damaged mail. *See Molzof*, 502 U.S. at 311 ("The § 2680 exceptions are designed to protect certain important governmental functions and prerogatives from disruption."). However, this reasoning does not apply with equal force to personal injury claims arising from the negligence of USPS employees who happen to be delivering mail. Such claims are not related to the unique function of the USPS, and because a claimant must prove that tortious conduct caused a personal injury, they do not carry the same potential for excess or fraud as do claims that mail was lost or damaged.

This case underscores our point. Mrs. Dolan was injured in a slip-and-fall caused by mail that was negligently left on her porch. Such a hazardous condition could just as easily have been created by any delivery service that leaves packages at the recipient's doorstep, or by any other private person who might leave an article on someone's porch. Thus, the negligent act that caused Mrs. Dolan's injury is not related



to the core function of the USPS as are claims arising from lost or damaged mail, and the exposure to excessive or fraudulent claims is no greater for the government than it is for any business that makes unattended deliveries. On the contrary, the risk of such claims is probably lower for the USPS than for other delivery services because USPS letter carriers ordinarily put the mail in a mailbox dedicated to that purpose rather than leaving it in an unexpected location. By contrast, private delivery services are prohibited from utilizing the mailbox. 18 U.S.C. § 1725; *see also U.S. Postal Serv. v. Council of Greenburgh Civil Assocs.*, 453 U.S. 114 (1981). In addition, because the FTCA does not provide for trial by jury, 28 U.S.C. § 2402, the risk of inordinately high damage awards is lower for the government than for private businesses.

*Kosak* identified a third rationale for the FTCA exceptions—to prevent extending FTCA coverage to suits for which adequate remedies were already available at the time the statute was enacted. 465 U.S. at 858-60; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 n.5 (1995). This rationale also supports a construction of the postal exception that precludes suits for loss of or damage to the mail itself, but allows suits for personal injuries caused by the negligence of USPS employees.

When the FTCA was enacted in 1946, it was well established that the postal laws and regulations provided an exclusive and adequate remedy for claims of lost or damaged mail. *See* 39 U.S.C. §§ 245, 381 (1940 & Supp. V 1945) (providing compensation of up to $1,000 for lost or damaged registered mail and $200 for lost or damaged insured mail); Postal Laws and Regulations pt. 44 (1948) (detailing intricate procedures on how USPS officials were to report and investigate claims of "loss, rifling, damage, or other mistreatment of mail matter, regardless of class, kind or

contents"). As this Court observed just seven years before the Act:

> There are over 44,000 post offices under the Post Office Department and it is common knowledge that millions of items of mail go through them every year. It is rather obvious that numerous claims, many of them for small amounts, are likely to arise in the course of many transactions. Under the Department's Regulations there is a fairly complete administrative formula for handling these claims from discovery to satisfaction. These facts . . . convince us that the Congress intended that claims . . . would be handled through the government rather than through various suits by individuals.

*United States ex rel. Midland Loan Fin. Co. v. Nat'l Sur. Corp.*, 309 U.S. 165, 175 (1940); *see also id.* at 175 n.24 (citing regulations providing for recovery by "senders or owners of the mail" for "loss, rifling, damage, wrong delivery of, or depredation upon" mail "by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof"). In fiscal year 1946 alone, the Department made payments on nearly 240,000 postal insurance claims at a cost of over $2.1 million. *Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946* at 96 tbl.30. In addition, the courts recognized that, because registration and insurance were available "to secure protection against loss or damage" to the mail, allowing suit outside the regulations would "circumvent the entire statutory scheme." *Twentier v. United States*, 109 F. Supp. 406, 409 (Ct. Cl. 1953) ("The United States is liable to the owners of lost or damaged mail only to the extent to which it has consented to be liable, and the extent of its liability is defined by the Postal Laws and



Regulations . . . [T]he liability of the Government in case of loss or damage is fixed by these regulations."). As explained in Part II below, the legislative history confirms that the postal exception to the FTCA was based on the availability of these protections.

Although registration, insurance, and search procedures provided an adequate remedy for lost or damaged mail, those programs did not cover personal injuries caused by the negligence of USPS workers acting within the scope of their employment. *See* 39 C.F.R. § 16.61 (1938) (limiting recovery through postal insurance to injuries to the mail itself while in the custody of the USPS). Prior to the FTCA, the Post Office Department had discretion to settle claims for personal injuries caused by USPS employees, but only for $500 or less. 31 U.S.C. § 224c (1940). This limited discretionary remedy for personal injuries was repealed and replaced by the FTCA scheme, Legislative Reorganization Act of 1946, ch. 753, § 424(a), 60 Stat. 812, 846-47 (1946), but the postal registration and insurance program has continued to provide the remedy for lost and damaged mail. Those who suffer personal injury as a result of negligence by USPS employees would have no remedy if the FTCA's postal exception applied to such claims. Thus, *Kosak*'s third rationale suggests that the postal exception was not intended to extend to such injuries. Indeed, without a remedy under the FTCA, Mrs. Dolan has no remedy at all.

### C. The Third Circuit Construed the Exception Broadly Based on a Rationale Rejected by this Court.

In the decision below, the Third Circuit held that the FTCA's postal exception should be construed broadly in favor of the government based on the principle that waivers of sovereign immunity are strictly construed. That is precisely the

approach that *Kosak* rejected as "unhelpful." 465 U.S. at 854 n.9. Because "unduly generous [to the government] interpretations of the exceptions run the risk of defeating the central purpose of the statute," *Kosak* explained, the proper approach in interpreting the FTCA's exceptions is to "identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953)). This Court has since reaffirmed that approach. *See Smith v. United States*, 507 U.S. 197, 203 (1993) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended.") (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)).

Indeed, to the extent that any special rule of construction is appropriate in the context of the FTCA exceptions, this Court's cases have suggested that exceptions to the "'sweeping'" waiver of sovereign immunity in the FTCA should be "narrowly construed." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); *see Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) ("We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'") (quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)).



## II. The Legislative History of the Exception Shows That Congress Did Not Intend to Bar Claims for Personal Injuries Caused by the Negligence of USPS Employees While Transporting Mail.

The legislative history of § 2680(b), sparse as it is, confirms that Congress meant to exclude claims for lost, damaged, or delayed mail, on the ground that postal insurance and registered mail provided adequate protection to the postal customer. The legislative history does not reveal any intent to preclude governmental liability for traditional, common-law torts causing personal injury, including those committed by USPS employees.

The FTCA was enacted as title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 842-47, but the legislative history of the enacted bill focused on internal reorganization of Congressional operations and not on the FTCA provisions. Consequently, the Court's review of the FTCA's legislative history has extended back to prior, stand-alone versions of the bill that Congress considered for more than two decades prior to the bill's enactment. *See Kosak*, 465 U.S. at 855-61.

The postal exception has its origins in the first versions of a proposed tort claims system. For instance, H.R. 8651, 69th Cong. (1926), contained an exception for "[a]ny claim arising out of the loss or miscarriage or negligent transmission of letters or postal matters." *Id.* § 8(a)(1). This language passed the House in the form of the Committee on Claims's amendment to S. 1912, 69th Cong. (1926), and was included in the tort claims legislation, H.R 9285, 70th Cong. § 4(a)(1) (1929), that was passed by the full Congress in 1929 but pocket

vetoed by President Coolidge.[3] The history of the postal exception in H.R. 8651, 69th Cong., is particularly helpful in determining the scope of the nearly identical postal exception in the enacted bill. The 69th Congress considered only three enumerated exceptions to FTCA liability, making the rationale for the postal exception more individually identifiable than when grouped with the other eleven exceptions in the bill that was later enacted.[4] In its report on H.R. 8651, 69th Cong., the Committee on Claims stated that the purpose of the exceptions "is to exclude from consideration under this bill certain classes of claims for which satisfactory relief is available under existing law." H.R. Rep. 69-206, at 4 (1926).

That the postal exception was based on Congress's identification of an extant remedy—the availability of postal insurance and registered mail—is demonstrated by the Committee on Claims's 1931 report on a revised proposal for a federal tort claims act, H.R. 17168, 71st Cong. (1931), that had grown to include eight exceptions. After listing the three exceptions that were in the 1926 legislation, the committee noted that "[i]n all of the last-mentioned cases settlements are provided by other statutes." H.R. Rep. 71-2800, at 9-10 (1931).

The nature of the available remedy was fleshed out by O.R. McGuire, Counsel for the Comptroller General of the United States, in his 1932 testimony before the Committee on Claims:

---

[3]For a general history of the initial efforts to secure passage of a tort claims act, see O.R. McGuire, *Tort Claims Against the United States*, 19 Geo. L.J. 133 (1931).

[4]These exceptions were the postal exception, an exception for the "assessment or collection" of taxes and duties, and an exception for previously recognized liability for certain navy, army, and admiralty activities. H.R. 8651, 69th Cong. § 8(a).



> Most of these exceptions are already taken care of by existing law. For instance take the first one, that any claim arising out of the loss or miscarriage or negligent transmission of letters or postal matter shall not be covered by this proposed act. Protection may be secured by insurance and registration. There is a provision of law for paying up to $50 for loss in mails, unless a higher value is declared.

*General Tort Bill: Hearing Before a Subcomm. of the House Comm. On Claims*, 72nd Cong., at 18 (1932); *see* Postal Laws and Regulations §§ 863, 1070 (1924) (providing compensation "in case of injury, loss or rifling of domestic registered mail"). Likewise, Alexander Holtzoff, a Special Assistant to the Attorney General, in explaining the postal exception to a subcommittee of the Senate Judiciary Committee in 1940, described the available remedies for lost mail:

> The first [exception] is [for] any claim arising out of the loss of, miscarriage, or negligence in the transmission of letters or postal matter. Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations.

*Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. at 38 (1940).[5]

---

[5]The Court has given significant weight to Alexander Holtzoff's interpretations of the FTCA, calling him "one of the major figures in the development of the Tort Claims Act." *Kosak*, 465 U.S. at 856.

In later bills, as the number of exceptions grew to a dozen or more, committee reports simply lumped all the exceptions together as "activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. 79-1400, at 33 (1946); *see also* H.R. Rep. 79-1287, at 6 (1945); S. Rep. 77-1196, at 7 (1942); H.R. Rep. 77-2245, at 10 (1942) (using nearly identical language to explain the exceptions). Nothing indicates that the drafters of the statute that was actually enacted in 1946 viewed the purpose of the postal exception as having changed since the initial versions of the FTCA that included almost identical language.

Thus, given Congress's intent to exclude from the FTCA claims for which other remedies were available, the existence of postal insurance and registered mail explains why § 2680(b) precludes claims for damages suffered from lost or damaged mail. But the legislative history of the postal exception offers no evidence that Congress intended to exclude claims for personal injuries caused by USPS employees while delivering mail where no other remedy is provided by law.

Indeed, the legislative history of the FTCA shows that Congress did not intend for the exceptions to cover injuries that would create traditional, common-law tort liability between private parties. For instance, while Congress noted a desire to exclude suits under the FTCA for the exercise of discretion by regulatory agencies' employees, it specified that "the common-law torts of employees of regulatory agencies" would still create government liability under the FTCA. H.R. Rep. 79-1287, at 6. Likewise, the exceptions for harms caused by the Trading with the Enemy Act or the fiscal operations of the Treasury (codified at 28 U.S.C. § 2680(e)(i)) were explained as still allowing recovery for injuries caused by government employees who were engaged in administering those programs, if premised on traditional, common-law concepts of tortious conduct between



private parties. *See id.; see also* Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 546 (1947) ("[T]he provisions are carefully worded in the attempt not to include the ordinary common-law torts of negligence of employees of those agencies, disassociated from their primary purposes. In hearings and committee reports this point is frequently stressed.").

## III. The Construction of the Statute Adopted Below Would Yield Absurd Results.

By adopting a construction of § 2680(b) that conditions governmental liability for the negligence of USPS employees on whether mail is being transmitted at the time of the negligent act, the court below has interpreted § 2680(b) in a manner that would yield absurd results. For example, under the Third Circuit's view, an individual who suffered a slip-and-fall on an empty mail bag negligently left on the sidewalk by a letter carrier after completion of the day's deliveries could pursue a claim under the FTCA, but if the bag contained mail that was still in transmission, recovery would be barred.

*Raila* discussed two similar hypothetical situations that "are plainly absurd and caution against adoption of the government's interpretation of [§ 2680(b)]." 355 F.3d at 123.

> [C]onsider a situation in which a USPS employee is driving a postal truck in the course of a mail delivery route. The driver throws a package toward the home to which it is to be delivered. The package hits a pedestrian and causes injury. At the same time, the driver has taken his eye off the road and the truck strikes another pedestrian, killing him. Under the government's proposed interpretation of "negligent transmission," the government would

be liable for the injury caused by the truck, but not by the flying package.

Consider also a situation in which two customers enter a post office and one turns right, the other turns left. Both slip on puddles of water that had been created through the negligence of postal employees. One puddle was created when a postal worker negligently dropped a parcel, shattering a vessel containing liquid. The other puddle was created by the janitor, who negligently failed to wipe away all the water when washing the floor. Under the defendant's proposed construction of "negligent transmission" the government would be liable for the injury caused by the janitor's puddle, but not for the injury caused by the shattered vessel, because the latter negligence occurred during the "transmission" of postal material.

*Id.* at 122. Congress did not intend such bizarre results when it enacted a sweeping waiver of the government's immunity for ordinary common-law torts. It included an exception to protect the government from suit by patrons claiming that mail had been lost, damaged, or delayed in transit, but it did not preclude personal injury suits simply because the tort was committed during the delivery of mail.

## CONCLUSION

The decision below should be reversed and the case remanded for proceedings on the merits of Mrs. Dolan's claim.



Respectfully Submitted,

JAMES R. RADMORE
*Counsel of Record*
LAW OFFICE OF JAMES R. RADMORE, PC
Two Penn Center, Suite 312
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 568-9900

MICHAEL T. KIRKPATRICK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

*Counsel for Petitioner*

July 2005

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-848

IN THE

# Supreme Court of the United States

BARBARA DOLAN,

*Petitioner*,

v.

UNITED STATES POSTAL SERVICE and the UNITED STATES OF AMERICA,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

HAROLD KRENT
*Counsel of Record*
CHICAGO-KENT
COLLEGE OF LAW
565 W. Adams Street
Chicago, IL 60661
(312) 906-5010

*Counsel for Amici Curiae*

July 14, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTION PRESENTED

Whether the discrete postal matter exception to Congress's otherwise broad waiver of the government's immunity under the Federal Tort Claims Act, which bars claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. § 2680(b), also bars claims based on physical injuries caused by the negligent acts of postal service employees.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF AMICI CURIAE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 5 |
| I. THE FTCA PERMITS CLAIMS FOR PHYSICAL INJURY CAUSED BY THE NEGLIGENCE OF POSTAL SERVICE EMPLOYEES | 5 |
| A. The Language and Structure of the Postal Matter Exception Strongly Suggest that Congress Intended to Exclude Only Claims Stemming From the Loss, Damage or Delay of Letters and Other Postal Matter | 6 |
| B. The Interpretive Canon *Noscitur A Sociis* Further Demonstrates Congress's Intent to Preclude Only Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter | 13 |
| C. The Legislative History Confirms that Congress Intended to Exempt Only Those Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter | 15 |
| II. THE COURT BELOW ERRED IN RELYING ON THE CANON THAT WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE STRICTLY CONSTRUED | 18 |
| CONCLUSION | 22 |

# TABLE OF AUTHORITIES

Page

**CASES:**

*Ardestani v. INS*, 502 U.S. 129 (1991) ..... 21

*Bailey v. United States*, 516 U.S. 137 (1995) ..... 9

*Colautti v. Franklin*, 439 U.S. 379 (1979) ..... 9

*Dolan v. U.S. Postal Serv.*,
377 F.3d 285 (3rd Cir. 2004)..... 3, 7-8, 18

*F.W. Fitch Co. v. United States*, 323 U.S. 582 (1944)... 14

*Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) ..... 3, 13

*Irwin v. Dep't of Veterans Affairs*,
498 U.S. 89 (1990)..... 19-20

*Jarecki v. Searle*, 367 U.S. 303 (1961) ..... 14-15

*Kosak v. United States*,
465 U.S. 848 (1984) .....2, 5, 7, 18

*Lane v. Pena*, 518 U.S. 187 (1996)..... 20

*Loeffler v. Frank*, 486 U.S. 549 (1988) ..... 19

*Raila v. United States*, 355 F.3d 118 (2d Cir. 2004) .. 10

*Ratzlaf v. United States*, 510 U.S. 135 (1994)..... 9

*Smith v. United States*, 507 U.S. 197 (1993) ..... 4, 19

*Third Nat'l Bank in Nashville v. IMPAC Ltd., Inc.*,
432 U.S. 312 (1977)..... 13

*United States v. Nordic Village, Inc.*,
503 U.S. 30 (1992)..... 20-21

*U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) ... 20



**STATUTES AND RULES:**

Federal Tort Claims Act

28 U.S.C. § 1346..... 5

28 U.S.C. § 2674..... 5

28 U.S.C. § 2680..... 6

28 U.S.C. § 2680(a) ..... 6

28 U.S.C. § 2680(b) ..... *passim*

28 U.S.C. § 2680(f)..... 6

28 U.S.C. § 2680(i)..... 6

28 U.S.C. § 2680(j)..... 6

**LEGISLATIVE MATERIALS:**

*General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 17 (1932).. 4, 15, 16

*Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940) ..... 4, 17

H.R. Rep. No. 69-667 (1926) .....16, 17

S. Rep. No. 79-1400 (1946) ..... 17

**OTHER AUTHORITIES:**

USPS, ACCIDENT INVESTIGATION – TORT CLAIMS, HANDBOOK PO-702 § 141 (June 1992).....2, 3, 12

USPS, MANAGEMENT INSTRUCTION, ACCIDENT INVESTIGATION TORT CLAIM ACTIVITIES, PO-730-90-01 (Jan. 8, 1990)..... 11-12

Brief for USPS in Opposition to Certiorari, *Dolan v. USPS* (No. 04-848)..... 3, 7, 10

Brief for Respondents, *Dolan v. USPS*, 377 F.3d 285 (3d Cir. 2004) (No. 03-1841) .....13

JAYSON & LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 13.01 (2005) ..... 11

Edwin M. Borchard, *The Federal Tort Claims Act*, 1 U. CHI. L. REV. 1 (1933) ..... 11

## INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a national, nonprofit public interest law and policy center advocating free enterprise principles and government accountability. WLF is interested in the regulation of the U.S. Postal Service, having participated in relevant proceedings before the Postal Rate Commission, the President's Commission on the U.S. Postal Service, and the Federal Trade Commission. WLF believes that the USPS should not operate at a competitive advantage over private carriers or be immune from liability where Congress has not expressly provided for such immunity. To that end, WLF filed an amicus curiae brief in *Flamingo Industries, Inc. v. U.S. Postal Service*, 540 U.S. 736 (2004).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation founded in 1964. AEF is dedicated to promoting education and has regularly appeared as amicus curiae in this Court, including joining as co-amicus with WLF in *Flamingo Industries*.

Amici oppose expansively construing the Federal Tort Claims Act to exempt the Postal Service from liability for injuries it causes to its customers and members of the public. Accordingly, amici believe that it is in the public interest to hold the Postal Service accountable for its negligent acts to the same extent that private carriers would be liable, except for the limited circumstances specified by Congress not applicable here.

---

[1] Pursuant to S. Ct. R. 37.6, amici hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The court below erred in expansively construing the postal matter exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(b), which excludes from suit "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." According to the court and respondent United States Postal Service (USPS), the exception precludes suit not only for injuries stemming from loss, damage, or delay of the mail itself, but also from any physical injuries caused by postal service employees in delivering the mail.

As an initial matter, the interpretation of the exception adopted by the court below cannot be reconciled with this Court's analysis in *Kosak v. United States*, 465 U.S. 848 (1984). There, this Court explained that "[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." *Id.* at 855. In context, "any claim" refers to those claims stemming from the loss, damage, or delay of letters or other postal matter. No claims can be made for mail that is lost or miscarried or negligently transmitted, whether because of delivery to the wrong address or because of a crash of a postal vehicle. When the claim does *not* arise out of damage to the mail or delay in delivery, the FTCA provides an avenue for relief. Indeed, the USPS's own Handbook on Investigating Accidents lists "common sources of tort claims" that have been recognized against the USPS to include not only "[a]ccidents resulting in injuries caused by unanchored or incorrectly anchored collection boxes," but also "[p]ersonal injury or damage to customer's property . . . [d]uring the delivery operation," the very category of claims in which petitioner's asserted injury falls. USPS, ACCIDENT INVESTIGATION – TORT CLAIMS, HANDBOOK PO-702 § 141 (June 1992).



The court below, however, construed the exception for claims arising out of "negligent transmission" of the mail to include any claim arising during "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." *Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 288 (3rd Cir. 2004). Such construction would, on its face, immunize the USPS even from claims arising out of crashes with postal vehicles. The construction offered by the USPS in its Brief in Opposition to the Petition for Certiorari fares no better. It interprets the exception to "protect the core delivery function of the USPS," Opp. Cert. at 6, which again would preclude claims arising out of the collision with a delivery truck, unless the USPS can suggest why a delivery truck is not part of the core delivery function of the USPS. And, if "transmission" refers only to the core delivery function, as opposed to the entire process of sorting, storing, and delivering mail, then claims alleging damage or delay in delivery due to causes not within the core delivery function – whether due to a work stoppage, anthrax threat, or whatever – could be asserted under the Act, a result that Congress did not likely intend. Such parsing of the statute makes little sense given the underlying goals of the FTCA.

Instead, Congress drew the line between claims stemming from loss, damage and delay of the mail and other injuries, whether to individuals or private property. The very structure of the statute lends support to that delineation. This Court has embraced the canon of *noscitur a sociis* to avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The terms "miscarriage" and "loss" both refer to injury arising from damage to the mail itself, so the neighboring term "negligent transmission" should be understood in the same light.

The legislative history confirms that Congress, through the postal matter exception, sought to exclude injuries stemming from loss, damage or delay of the mail. Sponsors repeatedly stressed that "the bulk of the cases we are trying to take care of are personal injury cases caused by automobiles of the Post-Office Service," *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 17 (1932) (statement of Assistant Attorney General Charles Rugg), and that such injuries are different from damage to the mail because "[e]very person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations .... It would be intolerable, of course, *if in any case of loss or delay* the Government could be sued for damages. Consequently, this provision was inserted." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940) (statement of Special Assistant to the Attorney General Alexander Holtzoff) (emphasis added).

Finally, the lower court's reliance on the canon of strictly construing waivers of immunity flatly contradicts this Court's teachings in *Smith v. United States*, 507 U.S. 197 (1993), and in *Kosak* that the canon is inapplicable in construing the exceptions in the FTCA given the broad waiver embodied in the FTCA itself. *Smith*, 507 U.S. at 203 ("we should not . . . assume the authority to narrow the waiver that Congress intended."). Thus, this Court should construe the postal matter exception to preclude only claims arising out of loss, damage or delay of the mail itself to conform to the statutory language, structure of the exception, and legislative history.



## ARGUMENT

### I. THE FTCA PERMITS CLAIMS FOR PHYSICAL INJURY CAUSED BY THE NEGLIGENCE OF POSTAL SERVICE EMPLOYEES

The statutory construction issues in this case may seem quite narrow. At stake is whether the postal matter exception to Congress's broad waiver under the FTCA of the government's immunity from tort, which covers "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. § 2680(b), exempts from suit physical injuries as well as harm arising from loss, damage, or delay of the mail itself. Underlying the dispute, however, are two issues with far greater import: first, the extent to which the USPS should be liable for routine torts of its employees; and second, whether the canon of strictly construing waivers of immunity apply to such interstitial statutory construction issues once a broad waiver of immunity plainly has been effected. Construing the postal matter exception broadly neither accords with Congress's underlying purpose in crafting what this Court has termed a "narrow" exception, *Kosak*, 465 U.S. at 855, nor with sound policy considerations for ensuring liability of the USPS when the negligence of its agents injures individuals who can neither anticipate nor easily insure for the harm.

Congress waived the government's immunity from tort suit in the Federal Tort Claims Act, 28 U.S.C. § 2674, in 1946. The Act provides that the United States generally shall be liable to the same extent as any private party "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §§ 1346, 2674. Congress crafted thirteen exceptions to its broad waiver of immunity to preserve the government's policymaking and protect the

government from excessive exposure to lawsuits. 28 U.S.C. §§ 2680(a)-(f), (h)-(n). For instance, Congress created exceptions for torts "caused by the fiscal operations of the Treasury or by the regulation of the monetary system," § 2680(i); for those "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," § 2680(j); and for those "caused by the imposition or establishment of a quarantine by the United States." § 2680(f). Lawsuits arising out of government negligence in these contexts could be ruinous to the public fisc. Moreover, Congress protected government policymaking through the discretionary function exception which, as its name suggests, shields the United States from liability based on its officials' exercise of discretionary functions. 28 U.S.C. § 2680(a). Congress therefore sought to ensure that tort claims against the government would not result in second-guessing government policy as under the discretionary function exception, or result in crippling judgments, as under the Treasury, combatant, and quarantine exceptions.

### A. The Language and Structure of the Postal Matter Exception Strongly Suggest that Congress Intended to Exclude Only Claims Stemming From the Loss, Damage, or Delay of Letters and Other Postal Matter

The USPS in this case relies on the postal matter exception to excuse liability. That exception exempts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the broad waiver of the government's immunity under the FTCA. At first glance, the exception might be construed expansively to immunize the postal service completely from suit. Whether the postal service is sorting, storing, or delivering mail, the USPS in some sense engages in "the transmission of letters or postal matter." Such interpretation, however, would defeat the very purpose of the Act in waiving the USPS's



immunity and exposing it to routine torts. Nonetheless, the court below adopted an interpretation of the postal matter exception nearly that broad. *Dolan*, 377 F.3d at 288. It held that "negligent transmission . . . means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter," and thus that all claims arising out of that process are precluded. *Id.* Similarly, the USPS argues in this Court that the exception should be read to bar all claims arising out of "the core delivery function of the USPS." Opp. Cert. at 6.

Such interpretations of the exception are wholly unpersuasive. In *Kosak*, this Court explained that the "motivation" for the postal matter exception "is not hard to find. One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." 465 U.S. at 855. This Court continued that, "[i]n order to ensure that § 2680(b) . . . did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility – namely, 'the loss, miscarriage or negligent transmission of letters or postal matter' – thereby excluding, by implication, negligent handling of motor vehicles." *Id.* Negligent transmission refers to claims asserting negligence in ensuring that the mail reach the consumer undamaged and on time.

The interpretations by the USPS and court below cannot be squared with this Court's statement in *Kosak* that Congress sought to allow claims for injuries arising from accidents with postal vehicles. The "process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS

delivers the letter or postal matter" plainly includes delivery whether by plane, truck, or foot. Neither the court below nor USPS explained why transporting mail in a postal vehicle should not be considered part of "conveying" postal matter or part of the "core delivery function of the USPS."

Assuming, instead, that the court below and USPS intended somehow to carve out vehicular accidents from the postal matter exception, their construction of the statute leads to incoherent results. For instance, if motorists can sue for injuries from a crash with a postal vehicle, consider whether a claim can be made for damages to a car resulting from being struck by a falling mail bag negligently left atop a passing postal vehicle. If that claim is barred, why treat that crash differently from a collision with the postal vehicle itself? On the other hand, if the USPS is liable, as amici contend, then suit logically can be pursued for the negligent placement of mail on a doorstep as well as for the negligent placement of the mailbag on top of the vehicle. Similarly, consider whether a pedestrian can recover for tripping over a mailbag negligently left near a neighborhood collection box.[2] If suit is barred, again it would not be clear why that accident should be distinguished from a car crash. And, if the USPS is liable, then negligent placement of the mailbag cannot readily be distinguished from negligent placement of the mail at petitioner's home. This Court should not attribute to Congress such arbitrary distinctions.

[2] Moreover, under the construction advanced by the USPS, consider whether individuals can sue who suffer injury to their persons or property from a postal carrier's negligence in delivering the mail at their homes, whether because the carrier carelessly steps on prize orchids or negligently uses mace to neutralize the family pet. It is difficult to believe that Congress, in waiving the USPS's immunity, intended such routine claims for injury to go unredressed just because the carrier was in the process of "transmitting" the mail.



Not only do the interpretations offered by USPS and the court below depart from the teachings of *Kosak*, they are inconsistent with this Court's many holdings that statutes should be interpreted so as to give effect to each term in the statute. Under the court of appeals' construction, for instance, the terms "loss" and "miscarriage" are superfluous, for the "process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter" would include loss and miscarriage of all mail. This Court has repeatedly held that courts should interpret statutes to give effect to each separate term adopted by Congress: "Congress intended each of its terms to have meaning. 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting.'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citing *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Thus, if this Court's statement in *Kosak* is to be followed and each term in the statute accorded distinct meaning, the exception must be read as something far less broad than covering *all* injuries related to transporting, sorting, and delivering the mail.

Moreover, the "core delivery function" gloss put forward by the USPS is also problematic in that it would allow damage claims to mail that did not fall within the terms "loss" or "miscarriage" to go forward as long as the damage or delay stemmed from postal service negligence in an area that was not closely linked to the "core delivery function." For instance, under the USPS's view, customers could sue for delay of mail due to a work stoppage at the USPS or delay due to negligent handling of an anthrax scare – events not closely tied to the core delivery service. Indeed, consumers could sue for delay or damage to the mail arising out of a plane or car crash given that such conveyance, in the USPS's view, evidently is not tied closely enough to the core

delivery service to come within the exception. Yet, such claims for damage and delay are the very type of claims that Congress wished to avoid in crafting the postal matter exception.[3] In short, USPS's reading of the exception is both overinclusive and underinclusive

The most compelling alternative reading of the exception is that Congress intended the exception to cover all injuries stemming from loss, damage or delay of the mail itself, much as the Second Circuit Court of Appeals determined in *Raila v. United States*, 355 F.3d 118, 122 (2d Cir. 2004). "Any claim," in other words, should be read to refer to those stemming from loss, damage, or delay of letters or other postal matter. Damage when mail is lost cannot be recovered, nor can damage to mail when it is miscarried or negligently transmitted. But for the exemption, the Postal Service uniquely would be exposed to ruinous lawsuits based upon such losses, and would be in a poor position to evaluate the credibility of the possibly overwhelming claims. It would be difficult after the fact to determine when the mail had been delivered, and the shape it was in upon delivery. In

[3]Perhaps recognizing the difficulties in its attempted refinement, USPS then argues that Congress intended to protect the United States from suits arising out of functions "unique to the performance of postal services." Opp. Cert. at 6. Again, this gloss cannot be derived from the language of the statute itself. Moreover, it would place courts in the problematic position of trying to separate postal service functions that are unique from those that are not. Indeed, the difference between the USPS delivering mail and private carriers delivering packages is unclear. Similarly, private carriers both sort and store letters and packages. The "unique performance" refinement therefore fails to distinguish one part of USPS functions from any other. To be sure, only the Postal Service is authorized to deliver to post office boxes or mailboxes on particular routes. But, the USPS has recognized claims when customers slip on the way to post office boxes, or when customers trip over neighborhood collection boxes. *See infra* at pp. 11-13. The "unique performance" distinction does not bear any weight.



contrast, harm to individuals can be evaluated by physicians, and there is less risk of fraud. Most often, there will be a witness, and forensic evidence may be available.

The above reading of the statute, unlike that of the court below, accords a different meaning to each term in the statute. Congress included the term "transmission" to account for damage to mail arising from sorting or storage mishaps, which might not be covered by the terms "loss" or "miscarriage," but did not intend to enlarge the exception by immunizing the government from injuries to individuals. Moreover, such reading of the statute follows this Court's recognition in *Kosak* that routine torts causing injury to individuals do not fall within the exception.[4] Thus, the wording and structure of the statute call for reading the exception to preclude only claims stemming from loss, damage, or delay of letters and other postal matter.

Indeed, USPS's internal guidelines support the above construction of the exception. Management Instruction T-9, issued by Assistant Postmaster General Arthur Porwick, lists the most "common sources of tort claims" meritoriously filed against the USPS as follows:

> a. Motor vehicle accidents involving government-owned or privately-owned or leased vehicles operated by postal employees

[4]As the only treatise on the Federal Tort Claims Act summarizes, "The [postal matter] exclusion was not, of course, intended to bar suit under the Act for the ordinary torts of postal employees, as where the negligence of a postal driver results in a collision and in injuries to a claimant." JAYSON & LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 13.01 (2005). At the time the bill was considered in Congress, Professor Borchard similarly characterized the exception as narrowly covering only "claims arising out of the loss or miscarriage of mail matter." Edwin M. Borchard, *The Federal Tort Claims Act*, 1 U. CHI. L. REV. 1, 3 (1933).

in the scope of their employment.

b. Falls in and around buildings owned, leased, or otherwise occupied by the Postal Service.

c. Accidents resulting from tripping over an exposed USPS collection box anchor or USPS neighborhood delivery and collection box unit (NDCBU) anchor bolts.

d. Accidents resulting in injuries caused by unanchored or incorrectly anchored collection boxes and NDCBUs.

e. Damage to customer's property during the delivery operation.

USPS, MANAGEMENT INSTRUCTION, ACCIDENT INVESTIGATION TORT CLAIM ACTIVITIES, PO-730-90-01 at 1 (Jan. 8, 1990). Thus, the USPS has recognized that claims asserting physical injury connected to the delivery process, whether a slip in picking up mail at the post office or a stumble over a collection box, fall outside the exception and should not be considered "claims arising out of the . . . negligent transmission of letters and other postal matter." As noted, the Management Instruction also recognizes claims for physical damage to a homeowner's property during delivery. The claim in this case – for physical injury due to negligent placement of the postal matter – is directly analogous.

USPS, ACCIDENT INVESTIGATION –TORT CLAIMS, HANDBOOK PO-702 (June 1992) on investigating and handling accidents, issued by the same Assistant Postmaster General, supports petitioner's construction of the exception even more powerfully. Section 141 recognizes claims for "*[p]ersonal injury* or damage to customer's property during



the delivery operation." *Id.* at 7 (emphasis added).[5] That is precisely what has been alleged here: a claim for "personal injury . . . during the delivery operation." Thus, the USPS has recognized claims like the one in this case, and its new interpretation of the statute cannot be squared with either historical practice or the guidance it provides in its manuals.

Finally, the USPS in the court below asserted that construing the postal matter exception to exclude physical injuries would open a floodgate of litigation. Br. at 21-23. Yet, for years the USPS handbook has stated that claims can be made for "personal injury or damage to a customer's property during the delivery operation," and no avalanche of cases has descended on the USPS. Indeed, the very paucity of reported lawsuits asserting physical harm in the sixty years after enactment of the FTCA suggests that permitting suit for physical injuries would not unduly burden the USPS. In Section 2680(b), Congress limited the general waiver of immunity so as to shield the Postal Service only from claims for loss, damage, or delay of the mail.

### B. The Interpretive Canon *Noscitur a Sociis* Further Demonstrates Congress's Intent to Preclude Only Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter

Application of the interpretative canon of *nosictur a sociis* confirms the above reading of the statutory exception. *Noscitur a sociis* "is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. IMPAC Ltd., Inc.*, 432 U.S. 312, 322 (1977); *Jarecki v. Searle*, 367 U.S. 303, 307 (1961). Relying on *noscitur a sociis* helps courts avoid "ascribing to one word a meaning so broad that

---

[5] The USPS Management Instruction and Handbook are both evidently still in use. *See www.usps.com/cpim/ftp/pubs/pub223.pdf.*

it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson*, 513 U.S. at 575.

The principle of *noscitur a sociis* has been applied to a variety of statutes covering a wide range of topics. For example, in *F.W. Fitch Co. v. United States*, 323 U.S. 582 (1944), Fitch brought an action against the United States in order to recover an alleged overpayment of the manufacturers' excise tax. The Internal Revenue statute in question included the phrase that a "transportation, delivery, insurance, installation, or other charge shall be excluded from the price." *Id.* at 584. The petitioner contended that advertising and selling expenses fell within the term "other charges" and thus were excludable under the statute. *Fitch*, 323 U.S. at 584. Applying the rule of *noscitur a sociis*, the Court noted that advertising and selling expenses are not comparable to the "specified charges for transportation, delivery, insurance, or installation – all of which are incurred subsequent to the preparation of an article for shipment." *Id.* at 585. The Court reasoned that the "other charges" term should be read to reflect expenses similar in character to those incurred for transportation, delivery, insurance and installation. *Id.* at 586. Because advertising and selling expenses are not analogous to the specifically listed items, they must be included in the tax base. *Id.*

For another example, in *Jarecki* the dispute centered on whether income from the sales of certain new products fell within the statutory definition of "abnormal income" which allowed the company to allocate some of this income to years other than those in which it was received for the purpose of computing the higher tax rate imposed during the Korean War. 367 U.S. at 304-05. The phrase in question defined "abnormal income" as income "resulting from exploration, discovery, or prospecting, or any combination of the foregoing." *Id.* at 305. One petitioner argued that its



research on two drugs should fall into the discovery exemption, and another petitioner argued that its new camera device should fall within the discovery exemption as well. *Id.* at 305-06. The Court looked to the surrounding words to ascertain the proper meaning of "discovery." *Id.* at 307. The three words used in conjunction (exploration, discovery, and prospecting) all described income producing activities in the oil, gas, and mining industries. *Id.* "The application of the maxim [*noscitur a sociis*] here leads to the conclusion that 'discovery' means only the discovery of mineral resources." *Id.*

The terms "miscarriage" and "loss" in this case both refer to injury arising from damage to the mail itself. Under the construction rule of *noscitur a sociis*, the neighboring term "negligent transmission" should be understood in the same vein. Congress sought to protect the United States from claims stemming from loss, damage, or delay of the mail.

### C. The Legislative History Confirms that Congress Intended to Exempt Only Those Claims Stemming From Loss, Damage or Delay of Letters and Other Postal Matter

Examination of the legislative history strongly bolsters what the structure of the statute and canon of *noscitur a sociis* indicate. Congress intended the exception to protect the USPS from liability only for injuries stemming from loss, damage, or delay of the mail itself. At several points, leading defenders of the bill stressed that the Act, even with the exception, would provide an avenue of relief for individuals injured by postal vehicles. For instance, in a hearing before a Subcommittee of the House Committee on Claims, Assistant Attorney General Charles Rugg stated that: "I suppose that the bulk of the cases we are trying to take care of are personal-injury cases caused by automobiles of the post-office service. There are no exceptions covering

those." *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 17 (1932) (statement of Hon. Charles B. Rugg, Assistant Attorney General of the United States, Court of Claims Division). Similarly, Representative Emmanuel Celler argued that the FTCA was needed to provide a remedy if a small child were struck by a mail truck. H.R. REP. NO. 69-667, at 13 (1926). The construction advanced in the court below therefore undercuts the very purpose animating enactment of the FTCA. Congress intended the Act to apply to slip and fall cases in post office buildings, traffic accidents involving postal vehicles, and other physical injuries due to the negligence of postal officials.

Moreover, the legislative history further illuminates why Congress distinguished claims arising from damage to the mail from other torts committed by postal service employees. The House Report accompanying Senate Bill 1912 in 1926 asserted that, "The purpose of [the exception] is to exclude from consideration under this bill certain classes of claims for which satisfactory relief is available under existing law." H. R. REP. No. 69-667, at 4. O.R. McGuire, counsel to the Comptroller General of the United States and Special Assistant to the Attorney General of the United States, in responding to a representative's concerns that the exceptions to liability were overbroad, pointed out that Congress retained immunity for "loss, miscarriage, or negligent transmission" of the mails in part because "[p]rotection may be secured by insurance and registration of [postal matter]." *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72nd Cong. 18 (1932). The customer was in a better position than the postal service to assess the importance of the mail and to take steps accordingly. Customers, in other words, could self-insure to protect their mail against postal service negligence. On the other hand, individuals cannot self-insure for the possibility



of physical injuries inflicted by the negligence of postal service employees without, at the same time, insuring for injuries suffered due to the negligence of other tortfeasors, a much less efficient (not to mention fair) option. And there simply is no mechanism comparable to the registration of the mail to minimize the *risk* of personal injury.[6]

The legislative history reveals that Congress intended the exception to protect the USPS from claims stemming from damage to postal matter, not injuries to private individuals. As Alexander Holtzoff, Special Assistant to the Attorney General summarized, "Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, *if in any case of loss or delay* the Government could be sued for damages. Consequently, this provision was inserted." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940) (emphasis added). Thus, the legislative history suggests that the term "claim" in the postal matter exception refers only to those arising out of loss, damage, or delay of the mail itself – as stressed by Special Assistant Holtzoff – and not physical injuries suffered by individuals. There is no evidence in the legislative history suggesting the Congress intended the exception to shield the USPS from physical injuries arising in mail delivery.

---

[6] Indeed, the Senate Report accompanying the Act later echoed this testimony in explaining that the exception covered "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. REP. NO. 79-1400, at 33 (1946).

## II. THE COURT BELOW ERRED IN RELYING ON THE CANON THAT WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE STRICTLY CONSTRUED

Nor can the construction of the statute by the court below be salvaged by resort to the canon that waivers of sovereign immunity are to be construed strictly. The court stated that "any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government." *Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 287-88 (3d Cir. 2004).

This Court, however, has twice rejected the salience of that canon in construing exceptions to the FTCA. In *Smith v. United States*, 507 U.S. 197, 198 (1993), the Court addressed the question whether the waiver of sovereign immunity contained in the statute applied to cases arising out of injuries in Antarctica. In analyzing the breadth of the exception to the Act's broad waiver of immunity for "any claim arising in a foreign country," the Court did not use the "strict construction" rule. *See id.* at 203. Rather, the Court adhered to the rule that "we should not take it upon ourselves to extend the waiver . . . [n]either, however, should assume the authority to narrow the waiver that Congress intended." *Id.* Once it was clear that Congress had intended to waive a category of claims or type of relief, then no further strict construction was appropriate.

Moreover, in *Kosak*, this Court reiterated that the canon of strictly construing waivers of immunity is not applicable once the parameters of the broad waiver have been established. 465 U.S. at 848, 854. As the Court explained, "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Id.* Thus, "[w]e think the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Id.*



Outside the FTCA, this Court has similarly eschewed reliance on the canon of strictly construing waivers of immunity once the broad parameters of the waiver have been established. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 91-92 (1990), the question raised was whether the common law rule of equitable tolling applied in employment discrimination cases for which the government had waived its immunity pursuant to Title VII. This point was not specifically addressed in the statute, but rather than holding that equitable tolling was inapplicable because it was not unambiguously provided for in the statute, the Court stated that

> [o]nce Congress has made such a waiver [of sovereign immunity] we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

*Id.* at 95.[7]

The court below thus erred in relying on the canon of strictly construing waivers of immunity in reaching its expansive interpretation of the exception. As under *Smith*, *Kosak*, and *Irwin*, conventional tools of statutory

---

[7] The same has been held true by this Court with respect to other waivers of USPS's immunity. *See Loeffler v. Frank*, 486 U.S. 549, 565 (1988) (permitting award of prejudgment interest after concluding that the USPS's immunity under Title VII had been waived).

construction should apply to resolve the questions arising in interpreting the interstitial questions at stake once the basic terms of the waiver of immunity have been understood.

To be sure, this Court has invoked the canon when it remains unclear whether Congress intended to waive the government's immunity for particular types of relief or for a broad category of claims. In such cases, this Court has required a clear, unambiguous statement by Congress that the statute in question is intended to waive the United States' immunity.

In *Lane v. Pena*, 518 U.S. 187 (1996), for example, upon which the court below relied, this Court stated that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Id.* at 192. In that case, the Court addressed the question whether Section 504(a) of the Rehabilitation Act of 1973 provided monetary damages for individuals alleging that a government agency discriminated against them because of a disability. *Id.* at 189. The Court stated that, in order for the government to be liable for monetary damages, as opposed to equitable relief, "the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 192. Because the Court did not find such an unambiguous statement with respect to that type of relief, it held that Congress had not waived the United States' sovereign immunity to that form of relief. *Id.* at 200.

Similarly, the Court stated in *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992), that "the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" *Id.*at 34. The question was whether Section 106(c) of the Bankruptcy Code allowed a bankruptcy court to issue a judgment for monetary relief against the Internal Revenue Service. *Id.* at 31. The Court found that, although Section106(c) "waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary



claims." *Id.* at 34. As in *Lane*, the Court demanded a clear waiver before determining that Congress intended to subject the government to a new category of relief.[8]

Once a court has determined whether a category of claims or relief is available, however, then the canon of strictly construing waivers of immunity loses its force. Otherwise, the canon would become nothing more than a judicially created advantage for the government in litigation.[9] Indeed, in *Nordic Village* itself, the Court recognized that the canon had no place to play in construing the exceptions to the FTCA: "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act." 503 U.S. at 34.

Thus, the court below erred by invoking the canon of strict construction of waivers to support its reading of the exception. As in *Irwin*, *Kosak*, and *Smith*, this Court should approach the interpretative task without using a tiebreaker on the government's behalf. The wording, structure, and underlying congressional intent of the postal matter

---

[8] *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992), provides an example of the Court using its strict construction rule to analyze whether Congress has waived sovereign immunity with respect to a class of claims. In this case, the Court considered whether the United States had waived its liability from civil fines of a punitive nature imposed by a state for violations of the Clean Water Act or the Resource Conservation and Recovery Act of 1976. The Court found that neither statute contained an unambiguous waiver of sovereign immunity towards the particular type of claim - a claim for punitive damages brought by a state against a federal agency - that Ohio sought to bring. *Id.* at 628.

[9] As this Court counseled in *Ardestani v. INS*, 502 U.S. 129, 137 (1991), "once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"

exception convincingly support petitioner's argument that claims of physical injury do not lie within the exception.

## CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

HAROLD J. KRENT
*Counsel of Record*
CHICAGO-KENT COLLEGE OF LAW
565 W. Adams Street
Chicago, IL 60661
(312) 906-5010

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302

*Counsel for Amici Curiae*

July 14, 2005

FILED
SEP 15 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(5)

No. 04-848

# In the Supreme Court of the United States

BARBARA DOLAN, PETITIONER

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
PATRICIA A. MILLETT
*Assistant to the Solicitor General*
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

MARY ANNE GIBBONS
*General Counsel*
LORI J. DYM
STEPHAN J. BOARDMAN
MARTINA M. STEWART
*Attorneys*
*United States Postal Service*
*Washington, D.C. 20260*

## QUESTION PRESENTED

Whether a tort claim for personal injuries arising out of the negligent delivery of mail to a postal customer is a claim "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," within the meaning of the postal exception to the Federal Tort Claims Act, 28 U.S.C. 2680(b).

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statutory provisions involved ..... 1
Statement ..... 2
Summary of argument ..... 5
Argument:
The Federal Tort Claims Act exception for "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" includes personal injury claims arising out of the allegedly negligent delivery of mail directly to a postal customer ..... 7
A. Because the Federal Tort Claims Act is a waiver of sovereign immunity, the language of Section 2680(b) must be construed carefully not to expand the waiver beyond clear congressional design ..... 9
B. The plain meaning of "transmission of letters or postal matter" includes the act of delivering letters or postal matter directly to a postal customer ..... 11
1. Dictionary definitions of "transmission" include delivery ..... 11
2. Historical and contemporary usage of "transmission" includes the act of delivery .. 13
3. The context and structure of the postal exception encompass the direct delivery of mail to postal customers ..... 17

Table of Contents—Continued: Page

C. Section 2680(b) excepts from liability "any claim" arising out of the negligent delivery of mail to a postal customer, including both physical injuries and damage to the mail ..... 18
1. The statutory text does not distinguish between types of injuries ..... 18
a. The text's plain meaning ..... 19
b. The text's legislative evolution ..... 19
c. The exception's purpose ..... 22
2. Petitioner's own arguments support the exemption of personal injury claim ..... 23
a. Petitioner's arguments embrace personal injury claims ..... 23
b. The telegraph analogy is of no help to petitioner ..... 25
3. The historical and logical distinction between petitioner's claim and motor vehicle accidents underscores that a mail recipient's claim of negligent delivery falls within Section 2680(b) ..... 27
4. Tort claims based on the manner in which mail is delivered have a significant potential for fraud ..... 36
Conclusion ..... 42
Appendix ..... 1a

**TABLE OF AUTHORITIES**

Cases:

*Abraham* v. *Western Union Tel. Co.*, 23 F. 315 (C.C.D. Or. 1885) ..... 25



Cases—Continued: Page

*Birnbaum* v. *United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1998) ..... 38
*Block* v. *Neal*, 460 U.S. 289 (1983) ..... 28
*Bono* v. *United States*, 145 F. Supp. 2d 441 (D.N.J. 2001) ..... 37, 38
*Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988) ..... 34
*Brogan* v. *United States*, 522 U.S. 398 (1998) ..... 19
*Chicago, Rock Island & Pac. Ry.* v. *United States*, 220 F.3d 939 (7th Cir. 1955) ..... 30
*Commonwealth* v. *Closson*, 118 N.E. 653 (Mass. 1918) ..... 33
*Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 285 (1999) ..... 10
*Department of Energy* v. *Ohio*, 503 U.S. 607 (1992) ..... 10
*Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125 (2002) ..... 19
*Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242 (1812) .. 16
*Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 794 (1995) ..... 39
*Hall* v. *Commonwealth*, 105 S.E. 551 (Va. 1921) ..... 34
*Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460 (1980) ..... 23, 36, 39
*Hunt* v. *United States*, No. 01-2462-KHV, 2002 WL 553736 (D. Kan. Apr. 4, 2002) ..... 37
*Illinois Cent. R.R.* v. *Illinois*, 163 U.S. 142 (1896) ..... 33
*Indian Towing Co.* v. *United States*, 350 U.S. 61 (1956) ..... 11
*Johnson* v. *Maryland*, 254 U.S. 51 (1920) .... 33, 34, 35

Cases—Continued: Page

*John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) ..... 21
*Kosak* v. *United States*, 465 U.S. 848 (1984) ..... 9, 11, 23, 28, 36
*Lehman* v. *Nakshian*, 453 U.S. 156 (1981) ..... 10
*Molzof* v. *United States*, 502 U.S. 301 (1992) .. 22, 25, 39
*OPM* v. *Richmond*, 496 U.S. 425 (1990) ..... 10
*Price* v. *United States*, 174 U.S. 373 (1899) ..... 10
*Regents of the Univ. of Ca.* v. *Public Employment Relations Bd.*, 485 U.S. 589 (1988) ..... 14
*Robinson* v. *United States*, 849 F. Supp. 799 (S.D. Ga. 1994) ..... 28, 34
*Smith* v. *United States*, 507 U.S. 197 (1993) ..... 9, 10
*Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739 (2004) . 9, 22
*State* v. *Burton*, 103 A. 962 (R.I. 1918) ..... 30
*Suchomajcz* v. *United States*, 465 F. Supp. 474 (E.D. Pa. 1979) ..... 18, 25, 26
*United States* v. *Acord*, 209 F.2d 709 (10th Cir.), cert. denied, 347 U.S. 975 (1954) ..... 30
*United States* v. *Gonzales*, 520 U.S. 1 (1997) ..... 19
*United States* v. *Hart*, 26 Fed. Cas. 193 (C.C.D. Pa. 1817) (No. 15,316) ..... 34, 35
*United States* v. *Kubrick*, 444 U.S. 111 (1979) ..... 37
*United States* v. *Muniz*, 374 U.S. 150 (1963) ..... 39
*United States* v. *Neustadt*, 366 U.S. 696 (1961) .. 28, 29
*United States* v. *S.A. Empresa De Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) ..... 8, 23
*United States* v. *Shaw*, 309 U.S. 495 (1940) ..... 10
*United States* v. *Turkette*, 452 U.S. 576 (1981) ..... 19



Cases—Continued: Page

*United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) ..... 7, 23, 31, 32
*United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) ..... 7, 38
*Virginia* v. *Stiff*, 144 F. Supp. 169 (W.D. Va. 1956) ..... 33
*Vogler* v. *Greimann*, 78 F. Supp. 575 (D. Alaska 1948) ..... 33
*Western Union Tel. Co.* v. *Bennett*, 57 So. 87 (Ala. Ct. App. 1911) ..... 26
*Western Union Tel. Co.* v. *Priester*, 276 U.S. 252 (1928) ..... 26
*Western Union Tel. Co.* v. *Taylor*, 100 So. 163 (Fla. 1924) ..... 26
*White* v. *Western Union Tel.*, 14 F. 710 (C.C.D. Kan. 1882) ..... 26
*Willman, Ex parte*, 277 F. 819 (S.D. Ohio 1921) ..... 33

Constitution, statutes, regulations and rule:

U.S. Const. Art. I, § 8, Cl. 7 ..... 7
Act of May 8, 1794, ch. 23, § 13, 1 Stat. 359 ..... 14
Act of Apr. 30, 1810, ch. 37, § 39, 2 Stat. 604 ..... 13
Act of Mar. 3, 1825, ch. 64, 4 Stat. 102:
§ 40, 4 Stat. 113 ..... 14
§ 43, 4 Stat. 114 ..... 14
Act of Mar. 30, 1845, ch. 43, 5 Stat. 732:
§ 2, 5 Stat. 733 ..... 14
§ 6, 5 Stat. 734 ..... 13

Statutes, regulations and rule—Continued: Page

§ 7, 5 Stat. 735 ..... 14
§ 11, 5 Stat. 736 ..... 14
§ 12, 5 Stat. 736 ..... 14
Act of Mar. 3, 1863, ch. 71, § 27, 12 Stat. 705 ..... 13
Act of Apr. 19, 1904, ch. 1398, 33 Stat. 186 ..... 17
Act of June 7, 1924, ch. 375, 43 Stat. 668 ..... 16
Act of May 29, 1928, ch. 859, § 2, 45 Stat. 946 ..... 17
Act of June 11, 1940, ch. 305, 54 Stat. 263 ..... 17
Act of June 25, 1948, ch. 645, § 1716, 62 Stat. 782 ..... 21
Act of July 12, 1950, ch. 460, § 1, 64 Stat. 336 ..... 13
Act of May 8, 1952, ch. 247, 66 Stat. 67 ..... 16
Act of Mar. 23, 1953, ch. 10, § 1, 67 Stat. 7 ..... 13
Act of Aug. 15, 1953, ch. 511, 67 Stat. 614 ..... 16
Act of June 29, 1955, ch. 224, 69 Stat. 191 ..... 16
Act of Aug. 4, 1955, ch. 560, § 1, 69 Stat 497 ..... 13
Act of Jan. 13, 1965, Pub. L. No. 89-1, 79 Stat. 3 ..... 17
Act of Oct. 8, 1966, Pub. L. No. 89-633, 80 Stat. 879 ... 17
Act of Feb. 15, 1972, Pub. L. No. 92-232, 86 Stat. 39 ..... 17
Act of Jan. 9, 1985, Pub. L. No. 99-1, § 1, 99 Stat. 3 ..... 17
Act of Jan. 28, 1987, Pub. L. No. 100-1, 101 Stat. 3 ..... 17
An Act Authorizing the Governors of the Several States to Transmit, by Mail, Certain Books and Documents, ch. 168, 4 Stat. 741 ..... 14
An Act Authorizing the Transmission of Letters and Packets to and from Mrs. Harrison, ch. 19, 5 Stat. 461 ..... 13
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* ..... 1, 2
28 U.S.C. 1346(b)(1) ..... 2, 21, 1a



Statutes, regulations and rule–Continued: Page

28 U.S.C. 2674 ..... 1a
28 U.S.C. 2679(b)(1) ..... 21
28 U.S.C. 2680 ..... 2, 8, 22, 23, 2a
28 U.S.C. 2680(a) ..... 22, 2a
28 U.S.C. 2680(b) ..... *passim*
28 U.S.C. 2680(c) ..... 19, 22, 28, 3a
28 U.S.C. 2680(d) ..... 3a
28 U.S.C. 2680(e) ..... 22, 3a
28 U.S.C. 2680(f) ..... 22, 4a
28 U.S.C. 2680(g) ..... 4a
28 U.S.C. 2680(h) ..... 29, 4a
28 U.S.C. 2680(i) ..... 22, 4a
28 U.S.C. 2680(j) ..... 22, 4a
28 U.S.C. 2680(k) ..... 9, 4a
28 U.S.C. 2680(*l*) ..... 22, 4a
28 U.S.C. 2680(m) ..... 22, 28, 4a
28 U.S.C. 2680(n) ..... 22, 5a
Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 2(a), 98 Stat. 3192 ..... 17
Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.* ..... 22
7 U.S.C. 7760 ..... 15
10 U.S.C. 312(a)(5) ..... 16
18 U.S.C. 1696(b) ..... 15
18 U.S.C. 1696(c) ..... 15
18 U.S.C. 1716(b) ..... 15
18 U.S.C. 1716(c) ..... 15
18 U.S.C. 1716(d) ..... 15
18 U.S.C. 1716(e) ..... 15
28 U.S.C. 2401(b) ..... 37
31 U.S.C. 224c (1940) ..... 40
39 U.S.C. 101(a) ..... 8

Statutes, regulations and rule–Continued: Page

39 U.S.C. 403(a) ..... 16
39 U.S.C. 2603 ..... 40
39 U.S.C. 3011(a)(2) ..... 15
39 U.S.C. 3014(b) ..... 15
39 U.S.C. 3201(4) (2000 & Supp. II 2002) ..... 15
39 U.S.C. 3210 ..... 15
39 U.S.C. 3210(a)(4) ..... 15
39 U.S.C. 3214 ..... 15
39 U.S.C. 3217 ..... 15
39 U.S.C. 3623(d) ..... 15
39 C.F.R.:
Section 211.2(a) ..... 2
Pt. 320 ..... 38
Section 912.2(b) ..... 40
Fed. R. Civ. P. 12(b)(1) ..... 3

Miscellaneous:

*Black's Law Dictionary* (7th ed. 1999) ..... 11, 12
Comment, *The Federal Tort Claims Act*, 56 Yale L. J. 534 (1947) ..... 35
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Annex (reproduced as a note to Fed. R. Civ. P. 4) ..... 16
*Funk & Wagnall's New Standard Dictionary of the English Language* (1946) ..... 11
H.R. 9285, 70th Cong., 2d Sess. (1928) ..... 20
H.R. 17168, 71st Cong., 3d Sess. (1931) ..... 20
H.R. 129, 73d Cong., 1st Sess. (1933) ..... 20
H.R. 2028, 74th Cong., 1st Sess. (1935) ..... 20
H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1945) ..... 22



Miscellaneous—Continued: Page

Samuel Johnson, *A Dictionary of the English Language* (1755):
Vol. 1 ..... 12
Vol. 2 ..... 12
S. 1912, 69th Cong., 1st Sess. (1926) ..... 20
S. 4567, 72d Cong., 1st Sess. (1932) ..... 20
S. 1833, 73d Cong., 1st Sess. (1933) ..... 20
S. 1043, 74th Cong., 1st Sess. (1935) ..... 20
S. 2690, 76th Cong., 1st Sess. (1939) ..... 20
S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) ... 8, 22, 36
1 Thomas A. Street, *Negligent Transmission of Telegrams, in* 1 *Foundations of Legal Liability* (1906) ..... 26
Alexis de Tocqueville, *Journey to America* (J.P. Mayer ed., Doubleday & Co. 1971) ..... 8
1 Alexis de Tocqueville, *Democracy in America* (Vintage Books 1945) ..... 7, 31
1 *The Oxford English Dictionary* (1933) ..... 12, 19
*The Royal Standard English Dictionary* (1798) ..... 12
*Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. (1940) ..... 36
United States Post Office Dep't, *Annual Report of the Postmaster General For the Fiscal Year Ended June 30, 1946* (1947) ..... 16, 21, 40
United States Postal Serv.:
*2004 Annual Report* (2004) ..... 8, 36, 40
*Domestic Mail Manual* (Sept. 1, 2005) ..... 40
*Handbook* M-41, *City Delivery Carrier Duties and Responsibilities* (2001) ..... 2
*Postal Operations Manual* (2002) ..... 2

Miscellaneous—Continued: Page

*Pub. No. 100, The United States Postal Service: An American History, 1775-2002* (Sept. 2003) ..... 31, 34
*Webster's New International Dictionary of the English Language*:
(1917) ..... 11
(2d ed. 1948) ..... 11, 12, 18
*Webster's Third New International Dictionary* (1976) ..... 19
Noah Webster, *American Dictionary of the English Language* (1828) ..... 12

# In the Supreme Court of the United States

No. 04-848

BARBARA DOLAN, PETITIONER

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-20a) is reported at 377 F.3d 285. The opinion and order of the district court (Pet. App. 1a-13a) are unreported.

## JURISDICTION

The court of appeals entered its judgment on August 2, 2004. The petition for a writ of certiorari was filed on November 1, 2004, and was granted on April 25, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are reproduced in an appendix to this brief.

## STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of employees of the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA, however, excepts thirteen categories of governmental activity from that waiver of immunity. 28 U.S.C. 2680; see 28 U.S.C. 1346(b)(1) (qualifying the scope of the waiver). One of those exceptions preserves the federal government's immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

2. Petitioner alleges that she sustained physical injuries when she tripped over packages and other mail delivered to her porch by a mail carrier employed by the United States Postal Service. Pet. App. 2a, 15a; Compl. para. 7.[1] Petitioner subsequently filed an administrative

[1] Because the complaint was dismissed for lack of subject matter jurisdiction, Pet. App. 15a, the record does not reflect whether the mail was left on the porch because petitioner failed to provide a proper mail receptacle or the amount of mail exceeded the space available in the mailbox. See United States Postal Serv., *Postal Operations Manual* § 617.22 (2002) (under specified conditions, "parcels that do not require a signature may be left in a reasonably safe place, such as a porch or stairway that is protected from the weather"); see *id.* § 632; United States Postal Serv., *Handbook M-41, City Delivery Carriers Duties and Responsibilities* §§ 131.35, 131.37, 322.311 (2001); see generally 39 C.F.R. 211.2(a).



claim with the Postal Service. After investigation, the Postal Service denied her claim. Pet. App. 15a; Compl. para. 1.

Petitioner then filed a complaint under the FTCA against the United States and the United States Postal Service in the United States District Court for the Eastern District of Pennsylvania, seeking more than $200,000 in damages. Pet. App. 15a-16a; Compl. paras. 12, 17.[2] The complaint claimed negligence based on the Postal Service's alleged "[c]reating [of] a hazardous condition," and alleged failure "to properly inspect the said porch and the adjacent area," "to maintain the porch in a condition which would protect and safeguard persons lawfully upon the premises and prevent them from falling," "to correct the negligent or hazardous condition," "to post and/or erect and/or set out proper and adequate signs, cones, barriers of warning, in, on and about the said premises," and "to make said premises reasonably safe for its intended purpose." Compl. para. 8. The complaint further alleged that, as a result of the fall, petitioner suffered "severe and permanent injuries to her body, the bones, muscles, tendons, ligaments, nerves and tissues of her body, * * * sustained an aggravation and/or exacerbation of all known and unknown pre-existing medical conditions[, and] * * * suffered internal injuries of an unknown nature, * * * severe aches, pains, mental anxiety and anguish and a severe shock to her entire nervous system and other injuries, the full extent of which is not yet known." *Id.* para. 9.

The United States moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the case for lack of subject

[2] Petitioner concedes that, under the FTCA, the United States is the only proper defendant. Pet. App. 2a-3a, 16a.

matter jurisdiction on the ground that petitioner's claim falls within the postal exception to the FTCA, 28 U.S.C. 2680(b). Pet. App. 4a, 16a. The district court granted the motion, holding that Section 2680(b) bars petitioner's action. *Id.* at 1a-13a. The court held that "[n]egligently placing mail on a porch" falls "squarely within the plain meaning of 'negligent transmission' as that term is used in Section 2680(b)" because the "[t]ransmission of the mail was not complete until the USPS employee placed the mail on the porch." *Id.* at 6a. In the court's view, the statutory text squarely embraces the "unavoidable mishaps incident to the ordinary, accepted operations of the USPS." *Id.* at 7a. In addition, the court reasoned that imposing liability for "accidents stemming from the delivery of the mail would pose a threat of disrupting the governmental activity of ensuring that the millions of pieces of mail handled by the USPS are delivered efficiently." *Id.* at 8a.

3. The court of appeals affirmed. Pet. App. 14a-20a. The court of appeals agreed that the ordinary meaning of "negligent transmission of letters or postal matter," 28 U.S.C. 2680(b), is "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." Pet. App. 20a. The court further noted that the legislative history of Section 2680(b) "makes plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary * * * operations of delivering millions of packages and letters each year." *Id.* at 19a. In the court's view, "it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.*



## SUMMARY OF ARGUMENT

Section 2680(b)'s exclusion from FTCA liability of "[a]ny claim" arising out of the "negligent transmission of letters or postal matter" applies by its plain terms to petitioner's claim that her mail was negligently delivered to her house. First, the plain and long-established meaning of "transmission" is the transfer or delivery of items like letters from one person to another. That traditional understanding is consistent with how Congress has commonly employed the terms "transmission" and "transmit" in postal statutes since almost the beginning of the postal system itself. Accordingly, when Congress excepted from FTCA liability the "transmission" of mail, Congress excepted the Postal Service's act of delivering the mail to postal patrons.

Second, Section 2680(b)'s bar applies to "[a]ny claim" that arises out of the delivery of mail. The natural breadth of "[a]ny claim" necessarily embraces claims of personal injury as much as claims of damage to the mail itself. Moreover, like the surrounding exceptions, the postal exception is written in terms of the governmental activity protected, not in terms of the particular type of injury suffered. Congress's central concern was to insulate from private regulation, through the medium of tort liability, the vital federal function—what this Court has described as a sovereign necessity—of providing a universal, cost-effective, and secure system for the handling and delivery of mail between postal customers.

Petitioner's remaining arguments prove the government's point. Tort liability for the "transmission" of telegrams included, rather than excluded, liability for at

least some types of personal injury claims caused by the telegram's delivery.

Petitioner makes much of Congress's perceived intent to waive liability for motor vehicle accidents. But this case has nothing to do with the operation of a postal vehicle. In any event, petitioner's argument actually reinforces the government's reading of "negligent transmission of letters or postal matter." Prior to the FTCA's enactment, courts had already drawn a line between, on the one hand, the indirect, incidental, and fleeting effect of applying generally applicable traffic safety regulations to carriers of the mail, and, on the other hand, impermissible efforts to regulate or control directly the evolving and uniquely federal function of handling and delivering the mail as such. Historic practice and longstanding congressional usage of the term "transmission" in the postal context thus inform and reinforce Section 2680(b)'s natural reading, as including the allegedly negligent delivery of mail to a postal customer's home.

Finally, petitioner's insistence that Section 2680(b) simply mirrors the extant procedures for registering and insuring the mail fundamentally misunderstands the limited protection those programs provide. That argument also ignores the enormous potential for fraud arising from both the sheer volume of mail delivery, and the fact that the types of injuries involved generally occur within the close environs of private homes, rarely have disinterested witnesses, and, unlike traffic accidents, would often be unknown to and incapable of being investigated by the Postal Service until significant time has passed.



## ARGUMENT

### THE FEDERAL TORT CLAIMS ACT EXCEPTION FOR "ANY CLAIM ARISING OUT OF THE LOSS, MISCARRIAGE, OR NEGLIGENT TRANSMISSION OF LETTERS OR POSTAL MATTER" INCLUDES PERSONAL INJURY CLAIMS ARISING OUT OF THE ALLEGEDLY NEGLIGENT DELIVERY OF MAIL DIRECTLY TO A POSTAL CUSTOMER

The postal system is a "sovereign function" because it is a "sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981); see generally *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 739-740 (2004). "Government without communication is impossible," *Greenburgh Civic Ass'ns*, 453 U.S. at 121, and the postal system is "to many citizens situated across the country the most visible symbol of national unity," *id.* at 122. Just two Terms ago, the Court noted that the Postal Service "has broad[] obligations, including the provision of universal mail delivery, the provision of free mail delivery to certain classes of persons, and, most recently, increased public responsibilities related to national security." *Flamingo Indus.*, 540 U.S. at 747 (citation omitted). Indeed, the Constitution itself recognizes the necessity of empowering Congress to establish a national postal system to unify and connect the Nation. See U.S. Const. Art. I, § 8, Cl. 7 ("Congress shall have Power * * * To establish Post Offices and post Roads.").[3]

---

[3] Alexis de Tocqueville commented upon the extent to which early mail circulation in even remote areas of the United States fueled "intellectual activity" and "powerfully contribute[d] to the support of the democratic republic." 1 Alexis de Tocqueville, *Democracy in America*

Congress thus established the United States Postal Service as a "basic and fundamental service provided to the people by the Government of the United States [and] authorized by the Constitution," and Congress designated as its "basic function" "the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a). In fulfilling that vital function, the Postal Service, in Fiscal Year 2004, delivered more than 206 billion pieces of mail to 142 million delivery points across the United States. United States Postal Service, *2004 Annual Report* 18, 22.

Because the Postal Service could not perform that unique and indispensable service of handling, processing, and delivering mail universally and inexpensively unless "free from the threat of damages suit," S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), Congress excepted from the general waiver of the United States' immunity under the FTCA "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b); see generally *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984) (exceptions in Section 2680 mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals").

329 (Vintage Books 1945); see Alexis de Tocqueville, *Journey to America* 283 (J.P. Mayer ed., Doubleday & Co. 1971) ("There is an astonishing circulation of letters and newspapers among these savage woods. * * * I do not think that in the most enlightened rural districts of France there is intellectual movement either so rapid or on such a scale as in this wilderness.").



Petitioner's claim for damages, which arises directly out of the allegedly negligent delivery of mail to her home, falls squarely within the plain text of that exception. The exclusion of petitioner's claim is also supported by the structure of the FTCA, the purpose of the postal exception, legislative evolution of the provision, and historic usage of the term "transmission" in postal statutes.

### A. Because The Federal Tort Claims Act Is A Waiver Of Sovereign Immunity, The Language Of Section 2680(b) Must Be Construed Carefully Not To Expand The Waiver Beyond Clear Congressional Design

Petitioner straightforwardly alleges negligence in the "delivery of mail." Pet. 4; see Compl. para. 8. Because the delivery of mail is an inherent part of —indeed, is the ultimate purpose of—the "transmission" of mail, petitioner's claim is barred.

"The starting point of [the Court's] analysis * * * must, of course, be the language of § 2680[b]." *Kosak* v. *United States*, 465 U.S. 848, 853 (1984); *Smith* v. *United States*, 507 U.S. 197, 201 (1993) (relying on the "ordinary meaning of the language itself" in interpreting the FTCA's foreign-country exception, 28 U.S.C. 2680(k)). Where the "straightforward language" of an FTCA exception applies, judicially crafted limitations or qualifications on the exception—whether rooted in policy concerns or intimations in the legislative history—have no place. *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2748-2754 (2004).

Furthermore, in determining whether Congress opened to damages liability the government's daily de-

livery of approximately 660 million pieces of mail to tens of millions of locations, the Court must bear in mind that the FTCA is a waiver of the sovereign immunity of the United States. As such, Section 2680(b)'s language must be construed with care to ensure that the Court does "not take it upon [itself] to extend the waiver beyond that which Congress intended." *Smith*, 507 U.S. at 203; see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."). That rule of construction applies not only to determining whether the government is liable to suit generally, but also to identifying precisely which claims and remedies are permitted. See, *e.g.*, *Department of Energy* v. *Ohio*, 503 U.S. 607, 615, 620-627 (1992) (narrowly construing which type of damages fall within waiver for "civil penalties"); *Price* v. *United States*, 174 U.S. 373, 375-377 (1899) (even where waiver of immunity is clear, questions of scope of waiver, types of damages permitted, and "contingencies in which the liability of the government is submitted to the courts" remain subject to the rule of narrow construction).

The FTCA is no exception. Like other waivers of sovereign immunity, fundamental separation-of-powers principles require that the language be construed cautiously and that the congressionally enacted text be given its straightforward effect. The power to waive sovereign immunity resides exclusively in the hands of Congress. Neither the Executive Branch nor the Judicial Branch can effect a waiver through the exercise of their respective powers. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309



U.S. 495, 501-502 (1940). This Court's strict construction of statutory waivers of immunity thus ensures that courts do not mistakenly impose burdens on the public fisc or impair, through the threat of damages, the operation of vital governmental activities. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) ("Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction."). Accordingly, "the proper objective of a court attempting to construe" Section 2680(b) "is to identify those circumstances which are within the words and reason of the exception * * * no more," but just as importantly, "no less." *Kosak*, 465 U.S. at 853-854 n.9 (internal quotation marks omitted).

### B. The Plain Meaning Of "Transmission Of Letters Or Postal Matter" Includes The Act Of Delivering Letters Or Postal Matter Directly To A Postal Customer

#### *1. Dictionary definitions of "transmission" include delivery*

Today, as at the time of the FTCA's enactment, the ordinary meaning of "transmission" is the "[a]ct, operation, or process, of transmitting," and "transmit," in turn, is defined as "[t]o send or transfer from one person or place to another." *Webster's New International Dictionary of the English Language* 2692-2693 (2d ed. 1948); see also *Black's Law Dictionary* 1505 (7th ed. 1999) (defining "transmit" as "to send or transfer (a thing) from one person or place to another"); *Funk & Wagnall's New Standard Dictionary of the English Language* 2551 (1946) (defining "transmit" as "[t]o send through or across; pass or hand down; transfer"); *Webster's New International Dictionary of the English*

*Language* 2186 (1917) (defining "transmission" as the "[a]ct of transmitting, or state of being transmitted; as, the *transmission* of letters, news, and the like"); *id.* at 2186-2187 (defining "transmit" as "to send or transfer from one person or place to another"). Indeed, the consistent definition of "transmit" and "transmission" as conveying items—including letters in particular—from a sender to a recipient extends back centuries. See, *e.g.*, Noah Webster, *American Dictionary of the English Language* (1828) (defining "transmission" as "[t]he act of sending from one place or person to another; as the *transmission* of letters, writings, papers, news and the like"); *ibid.* (similar for "transmit"); 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "transmission" as "[t]he act of sending from one place to another, or from one person to another"); *ibid.* (similar for "transmit"); *The Royal Standard English Dictionary* 472 (1798) (defining "transmit" as "to send from place to place").

That common understanding of the term "transmission" necessarily encompasses the direct delivery of mail to a postal customer or destination, because that is the consummate step in conveying, transferring, and sending mail "from one person or place *to another*." *Webster's New International Dictionary*, *supra*, at 2692-2693 (2d ed. 1948) (emphasis added); *Webster's New International Dictionary*, *supra*, at 2187 (1917) (emphasis added); *Black's Law Dictionary*, *supra*, at 1505 (emphasis added); see also 1 *A Dictionary of the English Language* (defining "deliver" as "[t]o transmit").

Underscoring that ordinary understanding of "transmission," petitioner herself has described the delivery of her mail as "the designated end-point of the transmittal" and has acknowledged that her mail was "transmitted to



the correct address." Pet'r Answer to Def. Mot. to Dismiss at 7; see also Pet'r C.A. Br. 7 (exception for "improper transmittal is designed to provide immunity for the normal risks in mail delivery").

***2. Historical and contemporary usage of "transmission" includes the act of delivery***

Congress enacted the phrase "transmission of letters or postal matter" against a historical practice of employing the term "transmission" or "transmit" and its conjugates specifically in postal statutes as an umbrella term referring to the Postal Service's unique national role in handling, processing, and—of most relevance here—delivering mail to a final destination. See, *e.g.*, Act of Mar. 3, 1845, ch. 43, § 6, 5 Stat. 734 (deputy postmasters authorized "to transmit *to any person or place*" official letters or packages free of charge) (emphasis added); An Act Authorizing the Transmission of Letters and Packets to and from Mrs. [William Henry] Harrison," ch. 19, 5 Stat. 461 (Sept. 9, 1841); Act of Apr. 30, 1810, ch. 37, § 39, 2 Stat. 604 (militia officials may "by mail * * * transmit *to said generals*, any [specified] letter or packet") (emphasis added).[4]

---

[4] See also Act of Aug. 4, 1955, ch. 560, § 1, 69 Stat. 497 (providing that certain keys and other small articles "may be transmitted through the mails to [an identified] address"); Act of Mar. 23, 1953, ch. 10, § 1, 67 Stat. 7 (providing that mail sent by certain service members "shall be transmitted in the mails free of postage," and that some such letters "shall be transmitted to destination by air mail"); Act of July 12, 1950, ch. 460, § 1, 64 Stat. 336 (mail of service members in Korea and other designated areas shall be "transmitted to destination" free of postage and, when feasible, by air mail); Act of Mar. 3, 1863, ch. 71, § 27, 12 Stat. 705 (authorizing the Postmaster General to "provide by uniform regulation for transmitting unpaid and duly certified letters of soldiers,

Usage of "transmit" or "transmission" as a comprehensive reference to the Postal Service's role not just in receiving and processing mail, but also in delivering it to a person or place continues to the present day. Indeed, the criminal prohibitions on private mail delivery contained in the Private Express Statutes, see generally *Regents of the Univ. of Ca.* v. *Public Employment Rela-*

---

sailors, and marines in the service of the United States to destination"); Act of Mar. 3, 1845, ch. 43, § 2, 5 Stat. 733 (providing that specified newspapers "may be transmitted through the mail * * * to all subscribers or other persons"); *id.* § 7, 5 Stat. 735 (Members of Congress authorized "to transmit, free of postage, to any post office" certain documents); *id.* § 11, 5 Stat. 736 ("[N]othing contained in this act shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by a special messenger employed only for the single particular occasion."); *id.* § 12, 5 Stat. 736 (imposing penalties on "all persons * * * who * * * transmit by any private express, or other means by this act declared to be unlawful, any * * * mailable matter * * *, or who shall place or cause to be deposited at any appointed place, for the purpose of being transported by such unlawful means, any matter or thing properly transmittable[] by mail * * * , or who shall deliver any such matter * * * for transmission to any agent or agents of such unlawful expresses"); An Act Authorizing the Governors of the Several States to Transmit, by Mail, Certain Books and Documents, ch. 168, 4 Stat. 741 (June 30, 1834) (governors authorized "to transmit by mail * * * [specified documents] to the executives of other states"); Act of Mar. 3, 1825, ch. 64, § 40, 4 Stat. 113 ("That the adjutant general of the militia of each state and territory shall have the right to receive, by mail, free of postage, from any major general or brigadier general thereof, and to transmit to said generals, any letter or packet, relating solely to the militia."); *id.* § 43, 4 Stat. 114 ("the Postmaster General shall * * * transmit to the first comptroller of the treasury an account"); Act of May 8, 1794, ch. 23, § 13, 1 Stat. 359 (certificate and receipt for foreign mail "shall be * * * transmitted to the Postmaster General").



*tions Bd.*, 485 U.S. 589, 593 (1988), speak in terms of unlawfully "transmit[ting]" or the "transmission" of letters. 18 U.S.C. 1696(b) and (c). Likewise, criminal laws regulating the mailing of injurious or potentially dangerous articles, such as medicines, poisons, and scorpions, generally proscribe their "transmission in the mails" except when the "transmission" is "to," "from," or "between" specified individuals or entities. 18 U.S.C. 1716(b), (c), (d) and (e). That language necessarily embraces the Postal Service's actual delivery of the regulated item "to" the authorized recipient.

The sheer volume of references to "transmit" and "transmission" in postal statutes defies an exhaustive listing. And the commonality of the terms, in candor, precludes the argument that they have a singularly exclusive signification in every instance in which they are employed. But the overwhelming usage of "transmit" and "transmission" in federal postal laws and in the postal context generally, both historically and contemporaneously, either explicitly embraces the act of delivery to a destination or person, see pages 13-15 & n.4, *supra*, or functions as an umbrella term for the person-to-person or place-to-place direct handling, processing, and delivery of mail by the Postal Service.[5] That is also con-

---

[5] See 39 U.S.C. 3011(a)(2) (discussing certain advertisements that are "tendered for transmission through the mails"); 39 U.S.C. 3014(b) (regulating certain plants "tendered for transmission through the mails"); 39 U.S.C. 3201(4) (2000 & Supp. II 2002) ("'franked mail' means mail which is transmitted in the mail under a frank"); 39 U.S.C. 3210, title ("Franked mail transmitted"); 39 U.S.C. 3210(a)(4) ("transmission through the mails"); 39 U.S.C. 3214 ("transmission in the international mails"); 39 U.S.C. 3217 ("reciprocally transmitted in the domestic mails"); 39 U.S.C. 3623(d) ("transmission of letters sealed against inspection"); 7 U.S.C. 7760 (providing for the "terminal inspection" of

sistent with judicial usage in the postal context, see *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 270 (1812) ("An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage."), and with Congress's usage of "transmit" and "transmission" in a variety of other laws,

plants, plant products, and plant pests "transmitted" by the Postal Service); 10 U.S.C. 312(a)(5) (exempting from militia duty all "[p]ersons employed by the United States in the transmission of mail"); Act of June 29, 1955, ch. 224, 69 Stat. 191 (authorizing and directing the Postmaster General "to permit the transmission in the mails * * * of [certain] live scorpions"); Act of Aug. 15, 1953, ch. 511, 67 Stat. 614 (providing for reimbursement of the Post Office Department "for the transmission of official Government-mail matter"); Act of May 8, 1952, ch. 247, 66 Stat. 67 (allowing the Postmaster General to place certain limitations on "[t]he transmission in the mails of poisons for scientific use"); Act of June 7, 1924, ch. 375, 43 Stat. 668 (providing that certain publications, "when furnished by an organization, institution, or association not conducted for private profit, to a blind person without charge, shall be transmitted in the United States free of postage"); see also Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Annex (Canada), § II ("Transmission through postal channels" as a means of service) (reproduced as a note to Fed. R. Civ. P. 4); *id.* Annex (Venezuela), § 3; United States Post Office Dep't, *Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946*, at 1 (1947) ("With a sure, swift, and inexpensive method of *transmitting* letters, printed information, money, and merchandise, * * * our country is kept more united, broader and more enlightened outlooks are attained, better standards of living are developed, and social and business life immeasurably advanced.") (emphasis added); but see 39 U.S.C. 403(a) ("receive, transmit, and deliver").



where the term similarly refers to the actual delivery of an item to another person or place.[6]

***3. The context and structure of the postal exception encompass the direct delivery of mail to postal customers***

The context and structure of Section 2680(b) further demonstrate that the "negligent transmission" of mail includes the ultimate act of delivering mail to a postal customer. That is because the phrase's companion statutory terms exempting the "loss" or "miscarriage" of mail necessarily refer to errors in, *inter alia*, the deliv-

[6] See, *e.g.*, Act of Jan. 28, 1987, Pub. L. No. 100-1, 101 Stat. 3 ("[T]he President shall transmit to the Congress not later than January 30, 1987, the Economic Report."); Act of Jan. 9, 1985, Pub. L. No. 99-1, § 1, 99 Stat. 3 (nearly identical language for budget and economic report); Act of Jan. 13, 1965, Pub. L. No. 89-1, 79 Stat. 3 (same); Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 2(a), 98 Stat. 3192 (certain provisions for reorganization of executive agencies "may take effect only if the [reorganization] plan is transmitted to Congress * * * on or before December 31, 1984"); Act of Feb. 15, 1972, Pub. L. No. 92-232, 86 Stat. 39 ("[e]xtending the date for transmission to the Congress of the report of the Joint Economic Committee"); Act of June 11, 1940, ch. 305, 54 Stat. 263 (directing a certain commission to "transmit to Congress on or before January 3, 1942, a detailed statement of the manner of expenditure of" certain funds); Act of May 29, 1928, ch. 859, § 2, 45 Stat. 946 (directing the Secretary of State to "transmit to the two Houses of Congress copies in full of" certain certificates relevant to the appointment of presidential electors); Act of Oct. 8, 1966, Pub. L. No. 89-633, 80 Stat. 879 ("authoriz[ing] the Secretary of Agriculture to hold prepayments made to the Secretary by insured loan borrowers and transmit them to the holder of the note in installments as they become due"); Act of Apr. 19, 1904, ch. 1398, 33 Stat. 186 (directing the Commissioner of the General Land Office to "transmit to [registers of United States land offices] the original papers specified in [certain legal proceedings]").

ery of mail to a customer. The loss of mail is, at its core, the failure to get mail—to deliver it—to its intended destination. Likewise, a "miscarriage" of mail commonly refers to the erroneous delivery of mail, such as its misdirection to the wrong person or other form of failure to arrive at the proper destination. See *Webster's New International Dictionary*, *supra*, at 1568 (2d ed. 1948) (defining "miscarriage" as the "[f]ailure (of something sent) to arrive").

Accordingly, read as a whole and consistent with Congress's established use of the term "transmission" in the postal context, Section 2680(b) insulates from the threat of damage suits under the FTCA the United States' performance of the quintessentially postal function of directly delivering the mail to a postal patron.

### C. Section 2680(b) Excepts From Liability "Any Claim" Arising Out Of The Negligent Delivery Of Mail To A Postal Customer, Including Claims Of Both Physical Injury And Damage To The Mail

#### *1. The statutory text does not distinguish between types of injuries*

Petitioner does not dispute that "negligent transmission" of the mail includes negligent delivery of the mail. Instead, petitioner argues (*e.g.*, Br. 3, 4) that Section 2680(b) excepts from liability only a subcategory of damage claims arising out of the negligent delivery of mail. Specifically, petitioner and her amici contend that "negligent transmission" reaches only claims arising out of "alteration or injury to the package or letter" (Br. 7 (quoting *Suchomajcz* v. *United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979)), and not claims of "injury to persons" (Pet. Br. 4). See also Washington Legal Found. Br. 7 ("Negligent transmission refers to claims asserting



negligence in ensuring that the mail reach the consumer undamaged and on time.").

#### *a. The text's plain meaning*

The short answer to petitioner's argument is that the statutory text does not draw that distinction. Section 2680(b) excepts from the FTCA's coverage "[a]ny claim" arising out of the loss, miscarriage, or negligent transmission of mail. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)).[7] If Congress had wanted to confine the exception to claims of damage to the mail itself, Congress could have easily and much more naturally written the exception to preclude liability for "damage to the mail." Cf. 28 U.S.C. 2680(c) (addressing claims pertaining to the "loss of goods, merchandise, or other property").

#### *b. The text's legislative evolution*

Congress had multiple opportunities to enact the version of the postal exception that petitioners espouse.

---

[7] See *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-131 (2002) ("Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."); *Brogan* v. *United States*, 522 U.S. 398, 400-401 (1998) ("any false, fictitious or fraudulent statements" include false statements of all kinds and is not restricted to such statements "that pervert governmental functions"); *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); 1 *The Oxford English Dictionary* 378 (1933) ("any" defined as "indifference as to the particular one or ones that may be selected"; embracing all "no matter which" and "of whatever kind").

Perhaps the earliest version of the postal exception appeared in a proposed bill that expressly dichotomized the government's liability for claims of "damage to or loss of privately owned property," and claims for "personal injury or death." S. 1912, 69th Cong., 1st Sess. Title I, §§ 1(a), 8(a)(1), Title II, § 201 (Mar. 17, 1926). The postal exception appeared in Title I of the bill, which addressed property damage claims, but that exception to liability was not repeated in Title II's provisions concerning liability for personal injury claims. *Ibid.* Other bills repeated petitioner's proposed distinction. See H.R. 17168, 71st Cong., 3d Sess. Title I, §§ 1, 3(a)(1), Title II (Feb. 18, 1931); H.R. 9285, 70th Cong., 2d Sess. Title I, §§ 1(a), 4(a)(1), Title II (Feb. 16, 1928); H.R. 9285, 70th Cong., 1st Sess. Title I, §§ 1(a), 8(a)(1), Title II (Feb. 16, 1928). Not one of them was enacted.

Instead, by the time of the FTCA's enactment, Congress had abandoned the differential treatment of claims for property damage and personal injury. Subsequent bills specifically made the postal exception applicable to both personal injury and property damage claims. See, *e.g.*, S. 4567, 72d Cong., 1st Sess. Titles I, II, and § 206(1) (1932) (separately addressing property (Title I) and personal injury (Title II) claims, but making the postal exception applicable to both Titles); S. 1833, 73d Cong., 1st Sess. Titles I, II, and § 206(1) (1933) (same); S. 1043, 74th Cong., 1st Sess. Titles I, II, and § 206(1) (1935) (same); H.R. 129, 73d Cong., 1st Sess. §§ 1, 6(1) (1933) (expressly waiving liability for both property and personal injury claims in one Section, but then excepting "[a]ny claim" arising from the loss, miscarriage, or negligent transmission of the mail in a Section that applies to all "[t]he provisions of this Act"); H.R. 2028, 74th Cong., 1st Sess. §§ 1, 6(1) (1935) (same); S. 2690, 76th Cong., 1st Sess. Title I, § 1, Title III, § 303(1) (1939) (same).



The final legislation then streamlined the statutory text, enacting a single waiver of liability for "injury or loss of property, or personal injury or death," 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2679(b)(1), and concomitantly making the postal exception applicable to "[a]ny claim" arising out of the loss, miscarriage or negligent transmission of the mail, 28 U.S.C. 2680(b). The legislative evolution of that final text thus underscores that, in excepting "[a]ny claim" arising out of the negligent transmission of the mail, Congress meant exactly what it said. Indeed, Congress enacted that more comprehensive exception at a time when it was fully aware of the risk of injury to persons that could result from the "transmission" through the mail of "poisonous drugs," "medicines," and other potentially dangerous materials. Act of June 25, 1948, ch. 645, § 1716, 62 Stat. 782; see also United States Post Office Dep't, *Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946*, at 55 (1947) (*1946 Annual Report*) (table documenting nearly 2000 postal investigations in 1946 pertaining to the mailing of firearms, narcotics, explosives, poisons, inflammables, and intoxicants). While petitioner's proposed exception for damage to the mail might accord with Congress's "discarded draft[s]," it is the statutory text that Congress actually adopted that controls, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993), especially when the Court is construing a substantive limitation on a waiver of sovereign immunity.

*c. The exception's purpose*

Like almost all of Section 2680's exceptions to liability, the postal exception is written in terms of the governmental activity protected, not the particular type of injury suffered. See 28 U.S.C. 2680(a) (protecting "execution of a statute or regulation" and the "exercise or performance" of "discretionary function[s]); 28 U.S.C. 2680(c) (insulating the assessment and collection of taxes or custom duties and the detention of property by law enforcement officials); 28 U.S.C. 2680(e) (administration of the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*); 28 U.S.C. 2680(f) (imposition or establishment of quarantine); 28 U.S.C. 2680(i) (fiscal operations and monetary regulation); 28 U.S.C. 2680(j) (combatant activities of the military); 28 U.S.C. 2680(*l*) (Tennessee Valley Authority operations); 28 U.S.C. 2680(m) (Panama Canal Company operations); 28 U.S.C. 2680(n) (federal banks); accord *Sosa*, 124 S. Ct. at 2777 n.1 (Ginsburg, J., concurring in part and concurring in the judgment) (Section 2680(b) exception "focus[es] on a governmental act or omission").

That focus makes sense because a primary purpose of the postal exception, along with most of the other FTCA exceptions, is to protect from liability "certain governmental activities which should be free from the threat of damages suit." S. Rep. No. 1400, *supra*, at 33; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) (same); see *Molzof* v. *United States*, 502 U.S. 301, 311-312 (1992) ("Congress' primary concern in enumerating the § 2680 exceptions was to retain sovereign immunity with respect to certain governmental *functions* that



might otherwise be disrupted by FTCA lawsuits.").[8] The goal of insulating vital governmental activities from the inhibitions and constraints generated by the threat of damages suits can be achieved only if the protection comprehends all potential claims. Execution of the Postal Service's unique Nation-binding service of handling and delivering staggering quantities of mail across the Country would be impaired as much by the threat of damages for injury to persons—whether arising out of a fall (as in this case), the unknowing delivery of mail containing anthrax or a letter bomb, or the delay of or damage to medications sent by mail—as by the threat of damages for torn or water-soaked mail.

Section 2680(b), in short, is designed to be an up-front substantive protection for a governmental activity that has long been considered a "sovereign necessity." *Greenburgh Civic Ass'ns*, 453 U.S. at 121. Its application does not, as petitioner posits, turn on the post hoc happenstance of whether property or personal injury results.

*2. Petitioner's own arguments support the exemption of personal injury claims*

*a. Petitioner's arguments embrace personal injury claims*

Although petitioner starts out proposing a sharp distinction in Section 2680(b) between injuries to persons and injuries to the mail itself, she is unable to embrace that position wholeheartedly. Petitioner and her amici

---

[8] See also *Kosak*, 465 U.S. at 858; *Varig Airlines*, 467 U.S. at 808 (Section 2680 exceptions "protect certain governmental activities from exposure to suit by private individuals"); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam).

concede (Pet. Br. 4, 6; Washington Legal Found. Br. 7) that claims arising from the "delay" of mail delivery must also fall within Section 2680(b). Delay, however, infrequently damages the mail itself; it most often causes injury to the sender or recipient. That damage can be financial (where money or commercial papers are en route), psychic (where an intimate or familial communication is critically delayed or disrupted), or physical (where needed medication, medical equipment, or perishable food is delayed). But the injury is unquestionably to a person rather than to the mail.

In addition, even petitioner does not suggest that the explicit exceptions for "any claim" arising out of the "loss" or "miscarriage" of mail could conceivably be read to exclude claims of injury to persons from those missteps. Indeed, neither of those errors in mail delivery necessarily involves actual damage to the mail. In fact, miscarriage often occurs when mail is delivered intact to the wrong addressee. The injury in instances of loss and miscarriage, as in cases of delay, not infrequently involves harm to the person, which could be financial, physical, or emotional, such as if poisonous drugs or bacterial samples were misdelivered to a home rather than to a research laboratory, or if the delivery of intimate or sensitive mail to the wrong recipient invaded the sender's or recipient's privacy. Yet petitioner makes no effort to explain how Section 2680(b)'s straightforward and categorized bar to "any claim" arising out of the "loss," "miscarriage," or "negligent transmission" of the mail could admit of such on-again, off-again coverage of injuries to persons.



***b. The telegraph analogy is of no help to petitioner***

Petitioner suggests (Br. 6-7) that the Court should define "negligent transmission" by reference to telegraph transmissions, where, in petitioner's view, liability was imposed only for "the inadvertent substitution of words" in the delivery of the telegram. *Id.* at 7 (quoting *Suchomajcz*, 465 F. Supp. at 476). As an initial matter, petitioner fails to establish that the few citations she offers document a "widely accepted *common-law* meaning" of "negligent transmission," or that it had become a "term[] of art in which are accumulated the legal tradition and meaning of centuries of practice." *Molzof*, 502 U.S. at 306-307 (emphasis added). The two cases and two state statutes upon which petitioner relies fall far short of the type of showing necessary to contradict the plain text of the exception or to supplant nearly two centuries of established usage of the term "transmission" by Congress specifically in the postal context. Moreover, the analogy to the telegraph context is of limited utility because the agent transmitting a telegram plays a role in transcribing the message to be delivered that has no ready analog in the postal context.

In any event, to the extent the argument has any relevance, it reinforces the government's point. Much like claims of delay in mail delivery, liability for negligent transmission of a telegram was, at bottom, liability for negligence in the manner of the telegram's delivery to the recipient. While telegrams, by their very nature, involve the deciphering of code and the transcribing of words prior to physical delivery, the point is the same: the telegraph cases on which petitioner relies (Br. 6-7) imposed liability for negligence in how the product was delivered to the recipient. See *Abraham* v. *Western*

*Union Tel. Co.*, 23 F. 315 (C.C. Or. 1885) (mistranslation of message) (cited in *Suchomajcz*, 465 F. Supp. at 476); *White* v. *Western Union Tel. Co.*, 14 F. 710 (C.C. Kan. 1882) (failure to transmit message) (cited in *Suchomajcz*, 465 F. Supp. at 476); see also *Western Union Tel. Co.* v. *Priester*, 276 U.S. 252 (1928) (mistranslation of information).

In addition, tort liability for the negligent transmission of telegrams did include claims for injury to persons. See *Western Union Tel. Co.* v. *Taylor*, 100 So. 163, 165 (Fla. 1924); *Western Union Tel. Co.* v. *Bennett*, 57 So. 87, 88 (Ala. Ct. App. 1911); Thomas A. Street, *Negligent Transmission of Telegrams*, *in* 1 *Foundations of Legal Liability* 436, 456 (1906). To be sure, the type of personal injury involved in those cases was mental anguish rather than physical injury. But that is because of the infrequency with which persons might trip over or otherwise be physically injured by a telegram at the point of delivery, rather than evidence of some unarticulated doctrinal divide.

At the end of the day, petitioner's proposed interpretation of "negligent transmission," with its variable inclusion and exclusion of personal injury claims, has no firm anchor in text, history, or logic. Petitioner does not dispute that "negligent transmission" includes negligence in delivery, and admits to the coverage of at least some claims (although it is unclear which) that result in injuries to persons rather than just to the mail itself, and at least some claims (although it is unclear which) arising from the manner of delivery, apparently including claims based on mental anguish (but see Compl. para. 9), but apparently not physical injuries. The better reading is to hew to the natural meaning of transmission, as reinforced by Congress's repeated usage of



the term "transmission" in postal statutes over the centuries as an umbrella reference to the unique postal service of handling and ultimately delivering mail from senders to recipients.

***3. The historical and logical distinction between petitioner's claim and motor vehicle accidents underscores that a mail recipient's claim of negligent delivery falls within section 2680(b)***

As this Court explained in *Kosak*, the legislative history of the FTCA indicates an intent to subject the United States to liability for injuries arising from some motor vehicle accidents, including those involving postal vehicles. 465 U.S. at 855. The Court then commented, in dicta:

> In order to ensure that § 2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, "the loss, miscarriage, or negligent transmission of letters or postal matter"—thereby excluding, by implication, negligent handling of motor vehicles.

*Ibid.* But, contrary to petitioner's assertion (Br. 4-5), the assumption that Section 2680(b) does not apply to a postal employee's negligent handling of a motor vehicle does not help her cause, which falls squarely within the exception's plain text and which has nothing to do with motor vehicle operations.

Nor does anything in *Kosak* suggest the type of personal injury/mail damage distinction that petitioner (with caveats and exceptions) proposes. To the con-

trary, *Kosak* highlights the court of appeals' proper distinction between claims that arise directly from negligence in the unique postal function of handling and delivering the mail, and those claims that arise from routine negligence in the performance of auxiliary activities that are common to virtually all government agencies and that implicate the mail only by happenstance. This case falls squarely in the former category. As the Court observed in *Kosak*, Section 2680(b) was intended to bar suits based on alleged "torts committed by mailmen." 465 U.S. at 855. The basis for petitioner's claim is precisely such a tort, arising out of the mail carrier's placement of the mail at the point of delivery.

Consistent with *Kosak*, Section 2680(b) must be read and applied according to its terms, "no less and no more." 465 U.S. at 854 n.9. The exception does not extend broadly to any claim that might arise "in respect of" the mail, 28 U.S.C. 2680(c), or "arising from the activities of," 28 U.S.C. 2680(m), the Postal Service. Only claims directly "arising out of" the Postal Service's handling (*i.e.*, the loss, miscarriage, or negligent transmission) "of letters or postal matter" fall within the exception to FTCA liability. 28 U.S.C. 2680(b); see *Robinson* v. *United States*, 849 F. Supp. 799, 802 (S.D. Ga. 1994) ("[T]his exception was intended to apply to the handling of mail and postal matter alone.").

That careful focus on the duty of care allegedly breached—whether negligent operation of a vehicle, negligent maintenance of a building, or the negligent handling of mail—is consistent with this Court's decisions in *United States* v. *Neustadt*, 366 U.S. 696 (1961), and *Block* v. *Neal*, 460 U.S. 289 (1983), which hewed to a traditional definition of the tort of "misrepresentation" for purposes of the FTCA's negligent misrepresentation



exception, 28 U.S.C. 2680(h). The Court concluded that a more expansive reading of the exception to include "many familiar forms of negligent conduct [which] may be said to involve an element of 'misrepresentation,' [only] in the generic sense of that word," would have gone far beyond the congressional design. *Neustadt*, 366 U.S. at 711 n.26.

Similarly here, an interpretation of the postal exception that included every routine motor vehicle accident might well go beyond congressional design. The prototypical motor vehicle accident does not involve a postal customer complaining (as petitioner does) about the timing, content, or manner in which mail was sent or received, or asserting an injury caused by the mail itself. The motor vehicle case commonly involves a third party (neither a sender nor recipient) who is injured by the negligent operation of a vehicle—an act of negligence that is at most circumstantially related to the mail. Indeed, the fact that the vehicle is carrying mail is generally irrelevant to the nature of the claim or the injury. The claim would be the same whether the mail truck was empty or full.

Importantly, the governmental activity charged to be negligent and sought to be regulated through the mechanism of tort liability in the typical motor vehicle case is the routine operation of a vehicle under generally applicable safety rules, not the quintessential governmental service of handling and delivering the mail. While the operation of motor vehicles no doubt facilitates the Postal Service's operations, that activity is not unique to the Postal Service. Operating motor vehicles is something that thousands of non-postal government employees and millions of private people do every day. Nor is motor vehicle operation an inherent or defining compo-

nent of the singular role that the postal system plays within the government. The postal system functioned for well over a century before the advent of motor vehicles, and the Postal Service continues to deliver a significant percentage of the mail by letter carriers who walk, rather than drive, their routes.[9]

The postal system, however, has never and could never function without the act of delivering mail as such. The very essence of a postal system—the indispensable service that the Postal Service alone, and no other government agency, provides—is determining *what* items

[9] That does not mean that all tort claims arising out of postal vehicle accidents automatically fall outside of exception in Section 2680(b). For example, neither the sender nor the intended recipient of letters that were lost, damaged, or delayed as a result of a motor vehicle accident would have a claim, because such a claim would arise out of the "loss, miscarriage, or negligent transmission" of the letters themselves. Moreover, if the particular contours of a claim and the circumstances of the accident indicate that the accident occurred as a result of a postal policy or directive, or as part of the direct transmission of the mail to a customer (for example, if the customer backing out of his driveway asks the mail carrier to pass his mail through the car window, and, in the process of handing off the mail, the postal vehicle bumps the recipient's car), a close question as to the exception's applicability would arise. See also *State* v. *Burton*, 103 A. 962 (R.I. 1918) (Navy driver exceeded speed limit under the command of a naval officer that military necessity required him to proceed with the utmost dispatch). In addition, the government disagrees with petitioner's assertion (Br. 7) that the postal exception would not apply to tort claims brought by individuals struck by mail pouches thrown from moving trains at delivery stations. The cited court of appeals cases did not have occasion to address the applicability of the postal exception, as they turned upon different preliminary questions concerning the litigation of indemnification claims under the FTCA. See *Chicago, Rock Island & Pac. Ry.* v. *United States*, 220 F.2d 939 (7th Cir. 1955); *United States* v. *Acord*, 209 F.2d 709 (10th Cir.), cert. denied, 347 U.S. 975 (1954).



may be transmitted through the mails and *when* and *how* billions of pieces of mail will be processed from millions of senders and physically delivered to millions of homes, businesses, and postal boxes across the Country. Indeed, the consummate act of delivery is the *raison d'etre* of the postal system—the receipt and processing of mail are just steps towards the ultimate end of delivering it to an intended recipient. See *Greenburgh Civic Ass'ns*, 453 U.S. at 133 (the Postal Service is tasked with "operat[ing] as efficiently as possible a *system for the delivery of mail* which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south"). How the mail, in a Nation-binding system of universal service, is delivered to its recipients —whether through modern-day residential letter boxes, dropping mail bags to the ground from primitive airplanes,[10] or, as in 1831, "dropp[ing] an enormous bundle of letters at the door of [an] isolated dwelling"[11]—is a central component of the transmission of the mails.

Further, as this Court recognized in *Greenburgh Civic Ass'ns*, in rejecting a First Amendment claim of access to home letter boxes, the United States has a vital interest in insulating the final act of delivery of mail from interference and obstruction, and in ensuring that postal customers can readily distinguish governmentally delivered mail from other communications. For that reason, those persons who want delivery of mail "at their home or business [must] do so under the *direction*

[10] See United States Postal Serv., *Pub. No. 100, The United States Postal Service: An American History, 1775-2002*, at 27 (Sept. 2003) (*An American History*).

[11] 1 *Democracy in America*, *supra*, at 329 n.6.

*and control* of the Postal Service." 453 U.S. at 126 (emphasis added).

Thus, petitioner's claim lies both textually and practically at the heart of the FTCA's postal exception. She allegedly was injured, not by a mail truck or a slippery floor in a postal building (see Pet. Br. 19-20), but directly "by letters or postal matter" themselves, due to the allegedly negligent manner in which those "letters or postal matter" were transmitted to her home. The governmental action—the delivery of mail—that she alleges caused her injury is unique to the Postal Service. It is not performed by any other governmental agency. Petitioner's claim, moreover, does not seek to hold the government to the same, well-established rules that broadly govern private conduct, such as the operation of all motor vehicles, but instead seeks to assign to private individuals and the courts, through the mechanism of tort liability, the quintessentially postal judgment of how best to deliver letters or postal matter to their intended recipients when the designated mail receptacle is too small, too damaged, or otherwise unable to accommodate the delivery.

That distinction between the direct handling and processing of the mail and the safe operation, consistent with generally applicable traffic regulations, of vehicles that happen to be transporting the mail is almost as old as the postal system itself and would have been familiar to Congress. Long before the enactment of the FTCA, a number of cases, including two from this Court, had recognized that individuals operating vehicles transporting the mail could, in the absence of contrary federal direction, be subjected to generally applicable state regulations governing traffic safety without working an impermissible "stoppage of the mail" or otherwise unconstitutionally interfering with the distinctly federal function of handling and delivering the mail to its intended recipients. For example, in *Johnson* v. *Maryland*, 254 U.S. 51 (1920), in which the Court held that a State could not require the driver of a postal truck to obtain a state license, the Court noted:



> It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. * * * This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence.

*Id.* at 56 (citing *Commonwealth* v. *Closson*, 118 N.E. 653 (Mass. 1918)); see *Illinois Cent. R.R.* v. *Illinois*, 163 U.S. 142, 154 (1896) ("The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders[,] * * * [and] [i]t may well be * * * that the arrangements made by the company with the post-office department of the United States cannot have the effect of abrogating a reasonable police regulation of the state.") (dicta); *Closson*, 118 N.E. at 653-654 (general traffic rules that are "well adapted for the security and protection of all travelers" may be enforced against a mail carrier, because federal law does not "confer extraordinary rights upon mail carriers to use the ways as they please").[12]

---

[12] See also *Ex parte Willman*, 277 F. 819, 823 (S.D. Ohio 1921) (citing and discussing cases); *Virginia* v. *Stiff*, 144 F. Supp. 169, 171-172 (W.D. Va. 1956) (citing and discussing cases); *Vogler* v. *Greimann*, 78

As the Court explained in *Johnson*, such generally applicable rules of traffic safety implicate the mail only "incidentally" and "remotely," and do not target or "lay[] hold of" mail carriers "in their specific attempt" to deliver mail. 254 U.S. at 56, 57; see also *Robinson*, 849 F. Supp. at 802 (distinguishing, for purposes of Section 2680(b), between claims that "apply to the handling of mail and postal matter alone" and those that arise "from the negligence of * * * employees in driving postal vehicles * * * or in performing other duties not directly involving postal matter"). Such tort claims, in other words, are "disassociated from the[] primary" and vital governmental activity protected by the postal exception, implicating the actual handling of the mail only

---

F. Supp. 575, 577 (D. Alaska 1948) ("The driver of a government mail vehicle, while engaged in his official duty, must comply with local traffic regulations in instances where no inconsistent rule of conduct has been prescribed for him by Congress or the Postmaster General.") (dicta); *Hall* v. *Commonwealth*, 105 S.E. 551, 552-553 (Va. 1921) (in the absence of contrary federal direction, mail carrier must obey state speed limit because that general regulation "does not attempt to control and does not in its operation even incidentally interfere in any way with the performance of duty of the federal employee"); *United States* v. *Hart*, 26 Fed. Cas. 193, 194 (C.C.D. Pa. 1817) (No. 15,316) (Washington, C.J.) (federal law prohibiting the "stoppage of the mail" does not apply to a city official's stopping of a mail carrier for "driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants," where interference with the mail was temporary and a purely inadvertent consequence of enforcement of the general safety regulation). From the late 1800s through the first third of the 20th Century, many of the companies and persons transporting mail were government contractors (including the famed Pony Express), rather than government employees. See *An American History* 12-19. In some circumstances, such contractors might less readily claim a federal immunity from state regulation. Cf. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988).



indirectly. Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 546 (1947) (hearings and committee reports "stress[]" that the FTCA exceptions "are carefully worded * * * not to include the ordinary common-law torts of negligence of employees of * * * agencies disassociated from their primary purposes") (quoted at Pet. Br. 19).

By contrast, tort laws directly relating to—and thus regulating—the unique activity of delivering mail to postal patrons would not "incidentally," "remotely," *Johnson*, 254 U.S. at 56, 57, or only "temporar[il]y, *Hart*, 26 Fed. Cas. at 194, affect the mail as the indirect byproduct of a general law pertaining to an area of traditional state regulation. Petitioner's claim seeks to regulate substantively and permanently the delivery of mail *as such*, and it seeks to intrude into the most fundamental stage of mail transmission.

Tellingly, in the years leading up to the FTCA's enactment, the practice of home delivery of mail was still in its early stages, particularly outside major urban areas. United States Postal Service, *Pub. No. 100, The United States Postal Service: An American History, 1775-2002*, at 20-21 (Sept. 2003). Moreover, the transition away from person-to-person delivery to depositing mail in home letter boxes—a change driven by the significant time lost waiting to hand deliver mail to patrons and the resource-intensive process of attempting repeated re-deliveries—had just begun the decade before the FTCA's enactment and thus was still in its nascency. *Ibid.* It is one thing to assume that, in enacting the postal exception, Congress carried forward a judicially recognized distinction between the even-handed enforcement of generally applicable local traffic regulations and the traditionally federal role of handling and

delivering the mail between senders and recipients. It would be quite another thing to conclude in the face of the plain language of the postal exception that, through the FTCA, Congress intended to apply a patchwork quilt of tort regulation directly on the evolving practice of home delivery and the transition from time-intensive person-to-person delivery and re-deliveries to the modern-day practice of depositing or placing the mail unattended outside homes.

***4. Tort claims based on the manner in which mail is delivered have a significant potential for fraud***

Congress enacted the exceptions to FTCA liability not only to ensure that important governmental activities would "not be disrupted by the threat of damages suits," but also to avoid exposure "to liability for excessive or fraudulent claims." *Kosak*, 465 U.S. at 858; see also *id.* at 858 n.17 (citing legislative history); *Hatzlachh Supply*, 444 U.S. at 464 n.4; S. Rep. No. 1400, *supra*, at 33; *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (testimony of Alexander Holtzoff, Special Assistant to the Attorney General).

Permitting personal injury claims based on the delivery of mail to a recipient would render the Postal Service vulnerable to a broad range of fraudulent complaints. The volume of mail (and thus of potential tort complaints) handled by the Postal Service is staggering. The Postal Service employs 340,000 persons to deliver approximately 660 million pieces of mail to as many as 142 million different delivery points *each day*. *2004 Annual Report* 18, 22, 54. The Postal Service advises that the postal district in which petitioner resides has an average daily volume of 9 million pieces of mail to deliver. The sheer volume of the task and the carriers' dedication to the necessarily "swift completion of their appointed rounds," *id.* at 49, would make it exceedingly difficult for the Postal Service to track or document the manner or time in which individual pieces of mail were deposited with a recipient.



Moreover, while motor vehicle accidents almost universally occur on public thoroughfares and are frequently documented through police reports, most delivery mishaps would occur either within the privacy of the home or within its close environs, with few witnesses to the incident. And while the Postal Service is immediately aware of and able to investigate accidents involving its vehicles, the Postal Service generally would not even become aware of accidents based on the delivery of mail until a claim is filed, which could be as late as two years after the incident or after the plaintiff becomes aware of the injury. See 28 U.S.C. 2401(b); *United States* v. *Kubrick*, 444 U.S. 111 (1979). In addition, the mail recipient's close and almost exclusive control over the home, doorway, and other key areas would severely impair the Postal Service's ability to identify any potential precipitating conditions to the accident or to have access to and preserve relevant evidence. See *Bono* v. *United States*, 145 F. Supp. 2d 441, 446 (D.N.J. 2001) ("The potential for fraudulent claims is particularly high in cases of this type, where there are no witnesses to observe events after a letter carrier has completed his delivery."); *Hunt* v. *United States*, No. 01-2462-KHV, 2002 WL 553736, at *4 (D. Kan. Apr. 4, 2002) ("[B]ecause USPS witnesses are not typically present

after mail has been delivered, the potential for fraudulent claims is high.").[13]

As a result, construing Section 2680(b) to permit claims like petitioner's "would likely lead to an inundation of 'slip and fall' cases based on allegedly negligent mail delivery," which in turn would "likely disrupt USPS's ability to deliver mail." *Bono*, 145 F. Supp. 2d at 446. Congress enacted Section 2680(b) to shield the government and the courts from exactly that "potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year." *Birnbaum* v. *United States*, 436 F. Supp. 967, 974 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1978).

[13] The massive volume and universality, at low expense, of mail delivery provided by the federal postal service belie the assertions of petitioner (Br. 10) and her amici (Wash. Legal Found. Br. 1) that the Postal Service is no different from "any delivery service that leaves packages at the recipient's doorstep." No other organization bears the obligation of providing high- volume, universal, and nationally unifying service in a manner consonant with the ever-changing needs of national security. See *Flamingo Indus.*, 540 U.S. at 747. Furthermore, other services engage in a distinctly smaller overall volume of deliveries—generally limited to commercial package deliveries and express mail, see 39 C.F.R. Pt. 320—and they do so at enhanced prices that permit the sort of comprehensive package-by-package tracking needed to respond to claims like petitioner's. Many of those services attempt to provide the type of person-to-person delivery that became infeasible for the nationwide coverage of the Postal Service around the time of the FTCA's enactment. See p. 35, *supra*. And even those more elaborate (and expensive) services may not generally record delivery conditions or the precise location and situation of packages left without a signature.



Petitioner contends (Br. 11-13, 15-19) that the sole purpose of the postal exception was to withdraw from the FTCA's coverage claims already adequately addressed by the existing programs for registered and insured mail. But petitioner's argument does not fit either the statutory text or her legal theory. As an initial matter, petitioner's insistence (Br. 16) that, in enacting the postal exception, Congress was entirely unconcerned with the effect of tort liability on the uniquely sovereign and vital function of providing universal mail service for an enormous daily volume of letters and packages defies text, precedent, and common sense. See *Hatzlachh Supply*, 444 U.S. at 464 n.4 (explaining that the postal exception was "included because [it] related to activities for which, as a policy matter, the Government should be free from tort claims").[14] The broadly worded exception applies to "any claim," without regard to whether insurance or registration would protect the claimant. Moreover, given Congress's long-term concern with providing low-cost, universal mail service, it seems unlikely that Congress's singular goal in crafting the FTCA exception was to distinguish among postal patrons based on their ability to engage in limited self-protection. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 427 n.5 (1995) (omitting postal exception from a list of exceptions applying to "cases in which other

[14] See also *Molzof*, 502 U.S. at 311 ("The § 2680 exceptions are designed to protect certain important governmental functions and prerogatives from disruption."); *ibid.* (citing specifically to Section 2680(b), Court explains that "Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operation") (quoting *United States* v. *Muniz*, 374 U.S. 150, 163 (1963)).

compensatory regimes afford relief"). Indeed, at the time of the FTCA's enactment, registered or insured mail accounted for barely one-half of one percent (.56%) of all mail sent. See *1946 Annual Report* 5, 28.[15]

Second, petitioner's argument ignores the fact that there *was* another "extant remedy" (Br. 16) at the time of the FTCA's enactment: the Postal Service's authority to settle personal injury claims for $500 or less. 31 U.S.C. 224c (1940). Similar authority continues today, with no such statutory cap on payments. See 39 U.S.C. 2603; 39 C.F.R. 912.2(b).[16]

Third, petitioner agrees (Br. 4-7) that, at the least, Section 2680(b) applies to all claims for damage to and delay of mail. But for almost all mail transmissions, there are two parties—a sender and a recipient. Registration and insurance are available only to the sender and generally protect only the sender.[17] Recipients have no assured means of recovering for the loss of or damage to their mail and its contents, whether money, gifts, family heirlooms, or important papers. In addition, petitioner agrees (Br. 4-6) that mail delays are covered by the exception. But insurance and registration alone offer no compensation to the recipient, and generally none to the sender, for injuries or damages arising from delayed delivery of medicine, papers, or tickets. United States Postal Serv., *Domestic Mail Manual*, Pt. 609.4.3(f) and (ae) (Sept. 1, 2005). Furthermore, insurance and indemnity through registered mail are categorically unavailable for items of sentimental value, the contents of film, videotapes, laser disks, x-rays, MRI or CAT scan images, negotiable instruments over $15, lottery tickets, perishable goods, or harm to live animals. *Id.* at Pt. 609.4.3(c), (e), (h), (j), (k), (r), (z) and (ab).

[15] Today, registered and insured mail constitute only .029% of all mail sent. See *2004 Annual Report* 22, 53.

[16] Section 2603 provides:

> When the Postal Service finds a claim for damage to persons or property resulting from the operation of the Postal Service to be a proper charge against the United States, and it is not cognizable under [the FTCA], it may adjust and settle the claim.

[17] The sender may permit the addressee to file a claim for insured mail, see United States Postal Serv., *Domestic Mail Manual*, Pt. 609.1.3, 609.5.5 (Sept. 1, 2005), but that decision remains within the discretion and control of the sender.



Rather than relying on a misunderstanding of legislative history, the better course is to read Section 2680(b) consistent with its plain meaning, its legislative evolution, and historical usage of the term "transmission" in postal statutes as an umbrella reference to the uniquely postal service of handling and delivering "letters or postal matter." That straightforward reading of the statutory text also is consonant with contemporaneous court precedent distinguishing between incidental, remote, and temporary regulation of mail transporters through the application of generally applicable traffic safety regulations designed to protect the public at large, and attempts to regulate directly the uniquely federal task of handling and delivering the mail between postal customers. Finally, according "negligent transmission of letters or postal matter" its natural and historic meaning respects and protects, as Congress intended, the uniquely vital and uniquely federal role that universal, efficient, and cost-effective delivery of an enormous daily volume of mail plays in promoting national development, growth, and cohesion.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
PATRICIA A. MILLETT
*Assistant to the Solicitor General*
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
*Attorneys*

MARY ANNE GIBBONS
*General Counsel*
LORI J. DYM
STEPHAN J. BOARDMAN
MARTINA M. STEWART
*Attorneys*
*United States Postal Service*

SEPTEMBER 2005

## APPENDIX

## STATUTORY APPENDIX

**1. 28 U.S.C. 1346(b)(1) provides:**

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgir Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

**2. 28 U.S.C. 2674 provides:**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from

such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

**3. 28 U.S.C. 2680 provides:**

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.



(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

---

[1] So in original.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.



(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Supreme Court, U.S.
FILED
OCT 19 2005
OFFICE OF THE CLERK

No. 04-848

IN THE
# Supreme Court of the United States

BARBARA DOLAN,

*Petitioner,*

v.

UNITED STATES POSTAL SERVICE and the
UNITED STATES OF AMERICA,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

## REPLY BRIEF FOR PETITIONER

MICHAEL T. KIRKPATRICK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JAMES R. RADMORE
*Counsel of Record*
LAW OFFICE OF JAMES R. RADMORE, PC
Two Penn Center, Suite 312
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 568-9900

OCTOBER 2005

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF FOR THE PETITIONER ..... 1

I. The Government's Reliance On Dictionary Definitions And Historical Usage Of The Word "Transmission" Yields An Overbroad Interpretation Of The FTCA's Postal Exception. .. 2

II. Much Of The Government's Brief Is Inapposite Because Mrs. Dolan Does Not Propose The Distinction Between Claims For Personal Injury And Property Damage That The Government Attributes to Her. ..... 3

III. The Construction Of "Negligent Transmission" Urged By Mrs. Dolan Is Consistent With Its Historical Use. ..... 5

IV. The Government Errs By Focusing On Whether Mail Is Being Handled When The Negligence Occurs, Rather Than Whether The Duty Breached Is Unique To The Postal Service. ..... 8

V. The Legislative Purposes Of The FTCA And Its Exceptions Support Mrs. Dolan's Construction Of The Statute, And The Government Offers No Persuasive Response. ..... 11

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

**Cases**

*Abraham v. W. Union Tel. Co.*,
23 F. 315 (C.C.D. Or. 1885) ..... 6

*Brewer v. Postal Tel. Cable Co.*,
223 S.W. 949 (Mo. App. 1920) ..... 6

*Chicago, Rock Island & Pac. Ry. Co. v. United States*,
220 F.2d 939 (7th Cir. 1955) ..... 10, 11

*Friedlander v. Postal-Tel. Cable Co.*,
271 F. 954 (N.D. Ohio 1921) ..... 6

*Kaufman v. W. Union Tel. Co.*,
224 F.2d 723 (5th Cir. 1955) ..... 6

*Kosak v. United States*,
465 U.S. 848 (1984) ..... 11

*Marine Ins. Co. v. United States*,
378 F.2d 812 (2d Cir. 1967) ..... 11

*McNally Pittsburg Mfg. Corp. v. W. Union Tel. Co.*,
353 P.2d 199 (Kan. 1960) ..... 5-6

*Mentzer v. W. Union Tel. Co.*,
62 N.W. 1 (Iowa 1895) ..... 6, 7

*Molzoff v. United States*,
502 U.S. 301 (1992) ..... 5



*Raila v. United States*,
355 F.3d 118 (2d Cir. 2004) ..... 1

*Russ v. W. Union Tel. Co.*,
23 S.E.2d 681 (N.C. 1943) ..... 6

*So Relle v. W. Union Tel. Co.*,
55 Tex. 308 (1881) ..... 6

*United States ex rel. Midland Loan Fin. Co. v. Nat'l Sur. Corp.*,
309 U.S. 165 (1940) ..... 11-12

*United States v. Neustadt*,
366 U.S. 696 (1961) ..... 5

*Weld v. Postal Tel.-Cable Co.*,
103 N.E. 957 (N.Y. 1910) ..... 6

*W. Union Tel. Co. v. Bowen-Oglesby Milling Co.*,
2 S.W.2d 23 (Ark. 1928) ..... 6

*W. Union Tel. Co. v. Crumpton*,
36 So. 517 (Ala. 1903) ..... 6

*W. Union Tel. Co. v. Redding*,
129 So. 743 (Fla. 1930) ..... 6

*W. Union Tel. Co. v. Taylor*,
114 So. 529 (Fla. 1927) ..... 6

*White v. W. Union Tel.*,
14 F. 710 (C.C.D. Kan. 1882) ..... 6

**Statutes**

28 U.S.C. § 2680(b) ..... *passim*

28 U.S.C. § 2680(c) ..... 3

28 U.S.C. § 2680(*l*) ..... 3

28 U.S.C. § 2680(m) ..... 3

39 U.S.C. § 2603 ..... 14

**Historic Statutes**

31 U.S.C. § 224c (1940) ..... 13, 14

39 U.S.C. § 2409 (Supp. II 1960) ..... 14

Legislative Reorganization Act of 1946,
ch. 753, § 424(a), 60 Stat. 812 (1946) ..... 14

**Legislative History**

S. Rep. 86-1763 (1960) ..... 14

*Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*,
76th Cong. (1940) ..... 13, 15

**Miscellaneous**

William L. Prosser, *Law of Torts* (4th ed. 1971) ..... 5, 6



1 Thomas Atkins Street, *The Foundations of Legal Liability* (1906) ..... 5, 7

USPS, *Accident Investigation - Tort Claims, Handbook*, PO-702 § 141 (June 1992) ..... 13

USPS, *Management Instruction, Accident Investigation Tort Claim Activities*, PO-730-90-01 (Jan. 8, 1990) ..... 13

## REPLY BRIEF FOR THE PETITIONER

In her opening brief, Mrs. Dolan showed that the FTCA's postal matter exception bars any claim arising out of the failure of the Postal Service to fulfill its duty to deliver mail to its intended destination on-time and in good condition, but does not bar any claim arising out of ordinary negligence that happens to occur while the tortfeasor is delivering mail. Mrs. Dolan's construction shields the government from all claims arising out of loss or damage to the mail, while allowing claims that do not stem from violation of a duty unique to the Postal Service. It is the construction most faithful to the statute's text, structure, and purpose. *See Raila v. United States*, 355 F.3d 118 (2d Cir. 2004). To be clear, Mrs. Dolan's construction of the exception bars all claims, whether for personal injury or property damage, that arise when mail is lost, misdelivered, damaged, or delayed.

The government argues for a much broader construction that would bar all claims that arise from the "handling" of mail. The government's construction depends on a definition of "transmission" viewed in isolation from the rest of the statute. The government's response to Mrs. Dolan's construction, which interprets "negligent transmission" in a manner consistent with the language that surrounds it and the purposes of the exception, is based for the most part on a fundamental misunderstanding of Mrs. Dolan's position. The remainder of the government's brief argues unpersuasively that leaving items on a porch is an activity unique to the Postal Service, and the government fails to offer any meaningful response to Mrs. Dolan's review of the extant administrative remedies and pertinent legislative history.

## I. The Government's Reliance On Dictionary Definitions And Historical Usage Of The Word "Transmission" Yields An Overbroad Interpretation Of The FTCA's Postal Exception.

Mrs. Dolan acknowledged in her opening brief that, if considered in isolation, the phrase "negligent transmission" in 28 U.S.C. § 2680(b) could be read to bar every claim for negligence where the tortfeasor was handling mail, but explained that such an interpretation cannot be reconciled with the text, structure, purpose, and history of the exception and the FTCA as a whole. Pet. Br. 3. Thus, the government's focus on a dictionary definition of "transmission" misses the mark. *See* Gov't Br. 11-13. There is no dispute that dictionary definitions of "transmission" can encompass "delivery" in the broadest sense, but that unremarkable fact provides no help in interpreting "negligent transmission" within the context of § 2680(b). Indeed, the government concedes that "transmission" is such a common term that it has no single meaning even in the context of federal postal statutes (Gov't Br. 15), and none of the government's list of historical uses of "transmission" involve the phrase "negligent transmission."

Section 2680(b) excuses the government from liability for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." For the phrase "negligent transmission" to be consistent with "loss" and "miscarriage," it must refer to acts or omissions that constitute a breach of the government's duty to get mail to its intended destination on-time and in good condition, as opposed to all acts or omissions that occur while mail is being delivered. Thus, Mrs. Dolan argued in her opening brief that under the canon of *noscitur a sociis*, "negligent transmission" must refer to carelessness during delivery that causes the *mail* to be



delayed or damaged (Pet. Br. 4), a point to which the government does not respond.

The government also ignores Mrs. Dolan's observation that if Congress had intended § 2680(b) to have the sweeping breadth urged by the government, it could have explicitly excepted from FTCA coverage any claim "arising from the activities of" the Postal Service or "in respect of" the delivery of mail. Pet. Br. 5 & 9 (comparing text of § 2680(b) with that of 2680(*l*), (m), and (c)). That it did not do so indicates that Congress intended a more narrow construction.

## II. Much Of The Government's Brief Is Inapposite Because Mrs. Dolan Does Not Propose The Distinction Between Claims For Personal Injury And Property Damage That The Government Attributes to Her.

The government fundamentally misconstrues Mrs. Dolan's position. The government asserts that Mrs. Dolan would interpret § 2680(b) to except from liability only claims for property damage that arise from the negligent transmission of mail. Gov't Br. 18. The government is wrong. The parties' dispute is not about the nature of the resulting harm, but the nature of the *acts and omissions* that constitute "negligent transmission."

Mrs. Dolan argued in her opening brief that, by excepting from the FTCA all claims arising from the "negligent transmission" of mail, § 2680(b) shields the government from liability for any harm (whether to persons or property) that results when mail is damaged or delayed by negligence, but § 2680(b) provides no protection from claims for any harm (whether to persons or property) caused by negligence that does not affect the mail. The government fails to grasp this point.

As a result, much of the government's brief is inapposite—it addresses an argument that Mrs. Dolan does not make.

To be clear, Mrs. Dolan agrees that claims for personal injuries that arise from the "loss, miscarriage, or negligent transmission" of mail are barred by § 2680(b). The issue on which the parties disagree is whether Mrs. Dolan's personal injuries arise out of the "negligent transmission" of mail as that phrase is used in § 2680(b).

Mrs. Dolan did not suffer an injury because mail was lost, delivered to the wrong address, or damaged or delayed by negligence. Rather, Mrs. Dolan was injured in a slip-and-fall caused by the careless placement of "letters, packages and periodicals" on her porch. Pet. App. 15a. Section 2680(b) is not implicated just because it was a letter carrier's carelessness that created the hazard that resulted in Mrs. Dolan's injury. Section 2680(b) would bar Mrs. Dolan's claim only if she had been injured as a result of a failure by the Postal Service to carry out its unique duty to deliver mail to its intended destination on-time and in good condition.

For example, if Mrs. Dolan had suffered a personal injury because her medication was lost in the mail, or because dangerous articles were carried to her address instead of to the intended recipient, Mrs. Dolan's claim would be barred. Similarly, if Mrs. Dolan had been injured by the broken contents of a package damaged by negligence during delivery, or by eating food that had spoiled because the package was delayed by negligence during delivery, Mrs. Dolan's claim would be barred. In this case, however, the claim does not arise out of the Postal Service's failure to perform its unique governmental duty. The mail was not lost, delivered to the wrong address, or damaged or delayed through negligence. Thus, the government's immunity from "[a]ny claim arising out



of the loss, miscarriage, or negligent transmission of letters or postal matter" does not apply.

## III. The Construction Of "Negligent Transmission" Urged By Mrs. Dolan Is Consistent With Its Historical Use.

The government has exhaustively surveyed various uses of the word "transmission" in cases and statutes, but none of the sources cited in the government's brief use the two-word phrase "negligent transmission." As explained in Mrs. Dolan's opening brief, at the time the FTCA was drafted, the phrase "negligent transmission" had an established definition as a tort in the telegraph context. Pet. Br. 6-7. The meaning of the term "negligent transmission" at common law is thus relevant to determine the meaning of the same phrase in § 2680(b). "Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.'" *Molzoff v. United States*, 502 U.S. 301, 307-08 (1992) (quoting *United States v. Neustadt*, 366 U.S. 696, 707 (1961)).[1]

---

[1]The government argues that Mrs. Dolan cites too few cases to establish that the term "negligent transmission" had a widely accepted common-law meaning at the time the FTCA was enacted. Gov't Br. 25. Even a cursory survey of the reported cases and secondary sources, however, reveals that the tort for "negligent transmission" of telegrams was well-established. The tort is recognized in both the leading hornbook on tort law, *see* William L. Prosser, *Law of Torts* § 54, 329 (4th ed. 1971) (recognizing tort "against a telegraph company for the negligent transmission of a message"), and in one of the leading histories of the development of American common law, *see* Thomas Atkins Street, *Negligent Transmission of Telegrams* in 1 *The Foundations of Legal Liability* (1906) at 435-56. Indeed, the cases are legion. *See, e.g., McNally Pittsburg Mfg. Corp. v. W. Union Tel. Co.*, 353

In the telegraph context, "negligent transmission" referred to carelessness that breached the telegraph company's duty to accurately and timely transmit a message to its intended recipient. This use of "negligent transmission" is consistent with use of the same phrase in § 2680(b) to refer to carelessness

---

P.2d 199 (Kan. 1960) (action against telegraph company for damages resulting from negligent transmission of an intrastate telegraphic business message); *Kaufman v. W. Union Tel. Co.*, 224 F.2d 723 (5th Cir. 1955) (action for negligent transmission of telegram falsely represented to be a death message); *W. Union Tel. Co. v. Bowen-Oglesby Milling Co.*, 2 S.W.2d 23 (Ark. 1928) (affirming award of damages to telegram recipient who sold goods at the wrong price because of "the negligent transmission of the telegram"); *Friedlander v. Postal-Tel. Cable Co.*, 271 F. 954 (N.D. Ohio 1921) (describing telegraph company's "usual" defense that it has contracted to limit liability "for damages due to negligence in transmitting" messages and observing that "it is settled law in the United States courts" that such waivers are valid absent statute to the contrary); *Brewer v. Postal Tel. Cable Co.*, 223 S.W. 949 (Mo. App. 1920) (action "against the defendant telegraph company for damages arising out of the negligent transmission of a telegram"); *Weld v. Postal Tel.-Cable Co.*, 103 N.E. 957, 961 (N.Y. 1910) (action for recovery of "damages sustained by the plaintiffs through the alleged negligence of [telegraph company] in transmitting a telegraphic message"); *Abraham v. W. Union Tel. Co.*, 23 F. 315 (C.C.D. Or. 1885); *White v. W. Union Tel.*, 14 F. 710 (C.C.D. Kan. 1882). As Prosser explains, a "respectable minority of courts" allowed recovery not only for economic damages, but also for mental distress caused by the failure of a message to reach its destination as intended. Prosser, *Law of Torts*, at 329 (citing *So Relle v. W. Union Tel. Co.*, 55 Tex. 308 (1881); *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1 (Iowa 1895); *Russ v. W. Union Tel. Co.*, 23 S.E.2d 681 (N.C. 1943); *W. Union Tel. Co. v. Redding*, 129 So. 743 (Fla. 1930); *W. Union Tel. Co. v. Crumpton*, 36 So. 517 (Ala. 1903)). In addition, in several states, the tort was also recognized under state statutes that codified and refined the common law. *W. Union Tel. Co. v. Taylor*, 114 So. 529, 531 (Fla. 1927) (discussing state statute providing that telegraph companies were, "as at common law, liable for such damages as naturally and proximately flow or result from their negligent failure to transmit and deliver any message placed in their hands for transmission").



that breaches the government's duty to transmit mail to its intended recipient on-time and in good condition. Section 2680(b) bars claims for negligent transmission of mail, just as it bars claims for lost and miscarried mail, because Congress wanted to shield the government from liability for delivery errors that cause the mail to be damaged or delayed.

The tort of "negligent transmission" developed to hold telegraph companies liable for "breach of a public duty" to ensure that telegrams arrived at their destinations as intended, a duty that extended both to the sender and the recipient. Street, *Negligent Transmission of Telegrams*, at 435; *see id.* at 439 ("[E]ven leaving out of consideration certain statutory enactments which in a few states have imposed such a duty, the common law itself imposes a duty on the telegraph company to use due care."). That "duty on the part of the company to take care in transmitting messages [was] found in the status of telegraph companies and the nature of their business." *Id.* at 440. As explained in *Mentzer*, 62 N.W. at 3, a telegraph company "is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties . . . . It owes a duty to all whom it attempts to serve, independent of the contractual [relationship] entered into when it receives its messages." Similarly, the Postal Service has a public duty to transmit each article of mail to its intended recipient on-time and in good condition. By importing the common-law term "negligent transmission" into section 2680(b), Congress signaled its intent to shield the government from liability arising out of the breach that duty, while allowing claims against the government for failure to exercise a general duty of care that it has in common with any private person.

The government argues that "negligent transmission" at common law referred to "negligence in the manner of the telegram's delivery to the recipient" (Gov't Br. 25), but that

statement is true only to the extent that the manner of delivery affected the telegraph company's ability to fulfill its duty to communicate the message as intended. The government does not suggest that any claim arising from injury to a person or property caused by ordinary negligence would have given rise to a claim for "negligent transmission" just because the tortfeasor happened to be delivering a telegram when the hazard was created. Mrs. Dolan agrees with the government that "tort liability for the negligent transmission of telegrams did include claims for injury to persons" (Gov't Br. 25), but personal injuries resulted from "negligent transmission" only where they were precipitated by carelessness that disrupted the accurate and timely conveyance of the message.

## IV. The Government Errs By Focusing On Whether Mail Is Being Handled When The Negligence Occurs, Rather Than Whether The Duty Breached Is Unique To The Postal Service.

The government reluctantly concedes that the bar on claims arising out of the negligent transmission of mail does not bar claims arising from a postal employee's negligent operation of a motor vehicle, even while engaged in the delivery of mail. Gov't Br. 27, 29. In an attempt to reconcile that concession with its broad construction of § 2680(b), the government argues that the exception preserves sovereign immunity only for "claims that arise directly from negligence in the unique postal function of handling and delivering the mail." Gov't Br. 28. The government's focus on whether mail is being "handled" at the time the negligence occurs, rather than whether the duty breached is unique to the postal service, finds no support in the text, structure, or purpose of the statute, and is unworkable in practice.



As an initial matter, the government errs in claiming that the activity that gave rise to Mrs. Dolan's injury "is unique to the Postal Service." *Id.* at 32. Leaving items on a porch is a common activity engaged in by all manner of tradespeople, delivery services, and individuals trying to convey items or literature to a private home. Mrs. Dolan was injured by a hazardous condition that could just as easily have been created by a newspaper carrier, a neighbor returning a borrowed item, or a vendor delivering a product, as by a letter carrier delivering mail. Just as operating a motor vehicle is not a unique governmental function simply because the vehicle is carrying mail, leaving items on a porch is not a unique governmental function simply because the item delivered is mail. Thus, even under the government's construction, Mrs. Dolan's claim would not be barred.

More importantly, Mrs. Dolan's claim is not barred by § 2680(b) because her injuries resulted from the breach of a general duty of care that is common to both the government and private parties. Government employees and private parties alike have a duty not to create a hazardous condition when leaving items on a porch. In contrast, only the Postal Service has a duty to ensure that mail reaches its intended destination on-time and in good condition, and it is claims that arise from a breach of that duty that are barred by § 2680(b).

Having conceded that § 2680(b) does not bar all claims arising from postal vehicle accidents because driving is not an activity unique to the Postal Service, the government's construction of the exception requires it to make tenuous and tortured distinctions. Indeed, the government's construction is both overinclusive and underinclusive, because it seems to allow claims for the destruction of mail caused by the negligent operation of a motor vehicle, while barring claims for injuries

caused by a motor vehicle if the accident occurred while the vehicle operator was handling mail.[2]

For example, in the government's view, an accident in which a postal employee driving a mail truck hits a mail recipient's car "in the process of handing off the mail" would present "a close question as to the exception's applicability." Gov't Br. 30 n.9. Presumably, in the government's view, the identical accident would not present such a "close question" if the tortfeasor happened not to be handling mail at the time of the accident. But any rule that would distinguish between the two accidents makes little sense. The duty breached in both cases is the ordinary duty to observe care in the operation of a motor vehicle—it does not matter whether the driver happens to have mail in hand when the collision occurs.

The government's theory also requires it to take the extreme position that § 2680(b) bars "tort claims brought by individuals struck by mail pouches thrown from moving trains," *id.*, even though such claims were brought successfully in the decade following the FTCA's enactment. *See* Pet. Br. 7. The government dismisses those cases as "turn[ing] upon different preliminary questions concerning the litigation of indemnification claims under the FTCA," (Gov't Br. 30 n.9), but that response is misleading. For example, in *Chicago, Rock Island & Pacific Railway Co. v. United States*, 220 F.2d 939 (7th Cir. 1955), the court addressed the threshold question of

[2]Although the government denies that claims could be brought for mail damaged as the result of a motor vehicle accident (Gov't Br. 30 n.9), the government never explains how that result would flow from a construction of the exception that bars only those claims that arise from direct handling of the mail. In contrast, Mrs. Dolan's construction is clear—the exception bars any claim arising out of a breach of the government's duty to deliver mail to its intended recipient on-time and in good condition.



whether the United States could be sued for indemnification under the FTCA, but went on to address and reject the government's affirmative defense that the suit was barred by the FTCA's statute of limitations. *Id.* at 942. The government *could* have asserted the additional affirmative defense that the claim was barred by § 2680(b) if it had thought the exception applicable, but it did not, and a judgment against the United States was left standing. Indeed, the government has asserted the exception in other cases involving third-party indemnification claims under the FTCA. *See, e.g., Marine Ins. Co. v. United States*, 378 F.2d 812 (2d Cir. 1967).

## V. The Legislative Purposes Of The FTCA And Its Exceptions Support Mrs. Dolan's Construction Of The Statute, And The Government Offers No Persuasive Response.

The government addresses several of Mrs. Dolan's arguments only in the last three pages of its brief. *See* Gov't Br. 39-41. The opening brief explained that the most sensible reading of § 2680(b) is one that is consistent with Congress's intent to exclude from the FTCA claims for which adequate remedies were already available at the time the statute was enacted, such as claims arising from lost or damaged mail. Pet. Br. 11-13; *see Kosak v. United States*, 465 U.S. 848, 858 (1984) (describing Congress's objective of "not extending the coverage of the Act to suits for which adequate remedies were already available"). In particular, Mrs. Dolan noted that this Court, only seven years before the passage of the FTCA, recognized that the postal laws and regulations in place at the time provided "a fairly complete administrative formula" for handling claims arising out of loss or damage to the mail, and that "Congress intended that [such] claims . . . would be handled through the government rather than through various suits by individuals." *United States ex rel. Midland Loan Fin. Co. v. Nat'l Sur. Corp.*,

309 U.S. 165 (1940); *see* Pet. Br. 11-12 (citing pre-1946 postal laws and regulations). Tellingly, the government does not challenge any of this discussion of the administrative remedies available to postal customers prior to 1946.

The opening brief also showed that the FTCA's legislative history confirms that Congress intended that § 2680(b) would exclude claims for loss or damage to the mail because adequate protection was available through postal insurance and registration. Pet. Br. 15-19. The government offers no specific challenge to Mrs. Dolan's conclusion. Gov't Br. 41. Instead, the government provides three general responses.

First, the government objects to Mrs. Dolan's supposed "insistence" that "Congress was entirely unconcerned with the effect of tort liability on the uniquely sovereign and vital function of providing universal mail service" and her supposed contention "that the sole purpose of the postal exception was to withdraw from the FTCA's coverage claims already addressed by the existing programs for registered and insured mail." Gov't Br. 39. The short answer to this point is that it responds to arguments of the government's own invention. In fact, the opening brief stressed that the postal exception should be interpreted in light of the "core function of the USPS" to "deliver large quantities of mail at low cost," and it discussed all three of the general purposes for the FTCA's exceptions identified in *Kosak*. *See* Pet. Br. 9-13. A key purpose of § 2680(b) is to protect the government's ability to fulfill its unique public obligation to provide high-volume, universal, and low-cost mail service by preserving governmental immunity for claims that arise when mail is lost, misdelivered, damaged, or delayed. Mrs. Dolan's opening brief explained that this vital government function is not threatened by allowing tort claims against the USPS for negligence that does not arise out of a



failure to meet that obligation. *Id.* 9-11. Mrs. Dolan's construction of the exception is also consistent with Congress's purpose of avoiding exposure to liability for excessive or fraudulent claims.[3]

Second, the government accuses Mrs. Dolan of "ignor[ing] the fact" that, prior to the FTCA's enactment, the Postal Service had "authority to settle personal injury claims for $500 or less" (Gov't Br. 40 (citing 31 U.S.C. § 224c (1940))), thus allowing the government to suggest that personal-injury liability under the FTCA would have been superfluous. Again, the government is simply incorrect. Far from ignoring it, the opening brief specifically discussed this limited discretionary remedy and explained that the remedy was *repealed and*

---

[3]The government suggests that allowing liability for personal injury claims that arise while the tortfeasor is delivering mail will create a significant potential for fraud and lead to an "inundation" of slip-and-fall cases. Gov't Br. 36-38. But in the sixty years since the FTCA's enactment, even though no court of appeals had adopted the government's broad construction of § 2680(b) until last year, there have been very few reported cases involving such accidents. Notably, the Postal Service's own handbook for investigating tort claims lists "[p]ersonal injury or damage to [the] customer's property during the delivery operation" as among the types of "accidents resulting in tort claims," but does not list such claims under the immediately following section concerning "Claims Excluded Under the Federal Tort Claims Act." USPS, *Accident Investigation - Tort Claims, Handbook*, PO-702 § 141 (June 1992) at 7. USPS management instructions promulgated only two years earlier had referred only to "[d]amage to customer's property during the delivery operation," USPS, *Management Instruction, Accident Investigation Tort Claim Activities*, PO-730-90-01 (Jan. 8, 1990). This suggests that, at least since 1992, even the Postal Service anticipated that personal injury claims would arise out of the delivery of mail and that such claims would not be excluded from the FTCA. *See also Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. at 11 (1940) (discussing procedures to safeguard the government from fraudulent FTCA claims).

*replaced* by the FTCA. Pet. Br. 13 (citing Legislative Reorganization Act of 1946, ch. 753 § 424(a), 60 Stat. 812, 846-47 (1946)). Thus, that remedy could hardly have been a reason to exclude claims such as those raised by Mrs. Dolan. The government states that "similar authority continues today," (Gov't Br. (citing 39 U.S.C. § 2603)), but that statement is also incorrect.[4]

---

[4]To be clear, the government had the authority prior to 1946 to settle claims arising out of "any damage . . . to person or property by or through the operation of the Post Office Department" and that authority "extend[ed] to cases *caused by the negligence of any officer or employee* of the Post Office Department or Postal Service acting within the scope of his employment." 31 U.S.C. § 224c (1940) (emphasis added). However, when the FTCA was enacted in 1946, Congress repealed "[a]ll provisions of law" that authorized federal agencies to settle "on account of damage to or loss of property, or on account of personal injury or death, *caused by the negligent or wrongful act or omission of any employee* of the Government while acting within the scope of his office or employment." Legislative Reorganization Act of 1946, ch. 753, § 424(a), 60 Stat. 812, 846 (1946) (emphasis added). In addition to this blanket repeal, Congress specifically listed 31 U.S.C. § 224c as among those statutes affected by the repeal. *Id.* at 847. The same legislation also made clear that "nothing herein shall be deemed to repeal any provision of law authorizing" an agency to settle a claim in which the injury "was not caused by any negligent or wrongful act or omission of an employee." *Id.* Thus, § 224c remained in effect after 1946, but *only as to claims that did not involve negligence*. In later versions of the statute, Congress omitted the original language that extended settlement authority to negligence cases, making clear that the remedy did not extend to such claims. *See* 39 U.S.C. § 2409 (Supp. II 1960) ("When the Postmaster General finds a claim for damage to persons or property resulting from the operation of the Department to be a proper charge against the United States, and it is not cognizable under section 2672 of title 28, he may adjust and settle it in an amount not exceeding $500."); 39 U.S.C. § 2603 (1970); *see also* S. Rep. No. 86-1763 (1960), at A24 (explaining, as part of the revision notes to 1960 recodification of Title 39, that "[r]eference to negligence is omitted, since the Federal Tort Claims Act repealed that portion of section 224c").



Third, the government suggests that postal insurance and registration could not have been regarded as providing an adequate remedy for claims arising out of damage or delay of mail because those protections generally extended only to the sender rather than the recipient of mail. Gov't Br. 40-41. That fact alone does not render the protections inadequate. Indeed, it is often the sender who purchases insurance or registration to protect against claims by the recipient that the mail arrived damaged or not at all. Senders and recipients will generally resolve any disparities in relief available for lost or damaged mail through the private contractual relationships between those parties, such as a shipping agreement between two merchants or a sales agreement between a vendor and a mail-order purchaser or through uniform commercial laws governing the sales of goods. Moreover, the legislative history confirms that the postal exception was meant to exclude claims for the loss or delay of mail because those claims were adequately addressed by the existing regulations. *See Tort Claims Against the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. at 38 (1940) (Statement of Alexander Holtzoff) (expressly referring to the relationship between § 2680(b) and the availability of postal registration and stating that "[i]t would be intolerable, of course, if in any case of loss or delay the Government could be sued for damages. Consequently, this provision was inserted."). Finally, to the extent that the *current* Postal Service procedures afford limited or no protection for particular articles, such as laser disks or CAT scan images, those features of the current system are irrelevant to determining what Congress intended in 1946. *See* Gov't Br. 41.

* * *

Mrs. Dolan was injured by a hazardous condition that resulted from the breach of a general duty of care by a

government employee who happened to be delivering mail. Thus, Mrs. Dolan's claim is not barred as "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," because § 2680(b) bars lawsuits for harm that results from a breach of the Postal Service's unique duty to deliver the mail to its intended destination on-time and in good condition. Contrary to the government's assertions, the postal matter exception is not so broad that it shields the government from all claims for ordinary negligence just because the tortfeasor was handling mail.

## CONCLUSION

The decision below should be reversed and the case remanded for proceedings on the merits of Mrs. Dolan's claim.

Respectfully Submitted,

JAMES R. RADMORE
*Counsel of Record*
LAW OFFICE OF JAMES R. RADMORE, PC
Two Penn Center, Suite 312
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 568-9900

MICHAEL T. KIRKPATRICK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

*Counsel for Petitioner*

October 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## DOLAN *v.* UNITED STATES POSTAL SERVICE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–848. Argued November 7, 2005—Decided February 22, 2006

Under the Postal Reorganization Act, the Federal Tort Claims Act (FTCA) applies to "tort claims arising out of [Postal Service] activities." 39 U. S. C. §409(c). The FTCA, in turn, waives sovereign immunity in certain cases involving negligence committed by federal employees in the course of their employment, 28 U. S. C. §1346(b)(1), making the United States liable "in the same manner and to the same extent as a private individual under like circumstances," §2674. However, the sovereign immunity bar remains as to, *inter alia*, "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." §2680(b). Consequently, the United States may be liable if postal workers commit torts under local law, but not for claims defined by the exception. Petitioner Dolan filed an FTCA suit against the Postal Service for injuries she suffered when she tripped and fell over mail left on her porch by postal employees. The District Court dismissed the suit, and the Third Circuit affirmed, both concluding that, although the FTCA generally waives sovereign immunity as to federal employees' torts, Dolan's claims were barred by §2680(b)'s exception.

*Held:* Because the postal exception is inapplicable in this case, Dolan's claim may go forward. This Court assumes that under the applicable state law a person injured by tripping over a package or bundle negligently left by a private party would have a cause of action for damages. The question is whether §2860(b)'s exception preserves sovereign immunity in such a case. Considered in isolation, "negligent transmission" could embrace a wide range of acts. However, interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute's purpose and context. Here, both context and precedent require reading the phrase so that it does not

Syllabus

go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address. Starting with context, "negligent transmission" follows the terms "loss" and "miscarriage," which limit the reach of transmission. Mail is "lost" if it is destroyed or misplaced and "miscarried" if it goes to the wrong address. Since both terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if "negligent transmission" swept far more broadly to include injuries caused by postal employees but involving neither failure to transmit mail nor damage to its contents. This interpretation is supported by *Kosak* v. *United States*, 465 U. S. 848, where this Court noted that one of the FTCA's purposes was to waive the Government's immunity from liability for injuries resulting from auto accidents involving postal trucks delivering—and thus "transmitting"—the mail. Nothing in the statutory text supports a distinction between negligent driving, which the Government claims relates only circumstantially to the mail, and Dolan's accident, which was caused by the mail itself. In both cases the postal employee acts negligently while transmitting mail. In addition, focusing on whether the mail itself caused the injury would yield anomalies, perhaps making liability turn on, *e.g.*, whether a mail sack was empty or full. It is more likely that Congress intended to retain immunity only for injuries arising because mail either fails to arrive or arrives late, in damaged condition, or at the wrong address, since such harms are primarily identified with the Postal Service's function of transporting mail. The Government claims that, given the Postal Service's vast operations, Congress must have intended to insulate delivery-related torts from liability, but §2680(b)'s specificity indicates otherwise. Had Congress intended to preserve immunity for all delivery-related torts, it could have used sweeping language similar to that used in other FTCA exceptions, *e.g.*, §2860(i). Furthermore, losses of the type for which immunity is retained under §2680(b) are at least to some degree avoidable or compensable through postal registration and insurance. The Government raises the specter of frivolous slip-and-fall claims inundating the Postal Service, but that is a risk shared by any business making home deliveries. Finally, the general rule that a sovereign immunity waiver "will be strictly construed . . . in favor of the sovereign," *Lane* v. *Peña*, 518 U. S. 187, 192, is "unhelpful" in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating" the central purpose of the statute, *Kosak*, *supra*, at 853, n. 9, which "waives the Government's immunity from suit in sweeping language," *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547. Pp. 4–11.

377 F. 3d 285, reversed and remanded.

## Syllabus

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 04–848

## BARBARA DOLAN, PETITIONER *v.* UNITED STATES POSTAL SERVICE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 22, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

Each day, according to the Government's submissions here, the United States Postal Service delivers some 660 million pieces of mail to as many as 142 million delivery points. This case involves one such delivery point—petitioner Barbara Dolan's porch—where mail left by postal employees allegedly caused her to trip and fall. Claiming injuries as a result, Dolan filed a claim for administrative relief from the Postal Service. When her claim was denied, she and her husband (whose claim for loss of consortium the Dolans later conceded was barred for failure to exhaust administrative remedies) filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting that the Postal Service's negligent placement of mail at their home subjected the Government to liability under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§1346(b)(1), 2674. The District Court dismissed Dolan's suit, and the Court of Appeals for the Third Circuit affirmed, 377 F. 3d 285 (2004). Both courts concluded that, although the FTCA generally waives sovereign immunity as to federal employees' torts, Dolan's

claims were barred by an exception to that waiver, 28 U. S. C. §2680(b). We disagree and hold that Dolan's suit may proceed.

I

Under the Postal Reorganization Act, 39 U. S. C. §101 *et seq.*, the Postal Service is "an independent establishment of the executive branch of the Government of the United States," §201. Holding a monopoly over carriage of letters, the Postal Service has "significant governmental powers," including the power of eminent domain, the authority to make searches and seizures in the enforcement of laws protecting the mails, the authority to promulgate postal regulations, and, subject to the Secretary of State's supervision, the power to enter international postal agreements. See *Postal Service* v. *Flamingo Industries (USA) Ltd.*, 540 U. S. 736, 741 (2004) (discussing 39 U. S. C. §§101, 401, 407, 601–606). Consistent with this status, the Postal Service enjoys federal sovereign immunity absent a waiver. See *ibid.*; cf. *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit").

Although the Postal Reorganization Act generally "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued in its official name,'" *Flamingo Industries, supra*, at 741 (quoting 39 U. S. C. §401(1)), the statute also provides that the FTCA "shall apply to tort claims arising out of activities of the Postal Service," §409(c).

The FTCA, in turn, waives sovereign immunity in two different sections of the United States Code. The first confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment. This jurisdictional grant covers:

"claims against the United States, for money dam-

> ages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. §1346(b)(1).

As to claims falling within this jurisdictional grant, the FTCA, in a second provision, makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances," though not "for interest prior to judgment or for punitive damages." §2674; see generally *United States* v. *Olson*, 546 U. S. ___, ___ (2005) (slip op., at 1).

The FTCA qualifies its waiver of sovereign immunity for certain categories of claims (13 in all). If one of the exceptions applies, the bar of sovereign immunity remains. The 13 categories of exempted claims are set forth in 28 U. S. C. §2680, and the relevant subsection for our purposes, pertaining to postal operations, is §2680(b). It states:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

As a consequence, the United States may be liable if postal employees commit torts under local law, but not for claims defined by this exception.

This was the provision relied upon by the District Court and Court of Appeals to dismiss Dolan's suit. The Court of Appeals' decision created a conflict with a decision of the Court of Appeals for the Second Circuit. See *Raila* v. *United States*, 355 F. 3d 118, 121 (CA2 2004). We granted

certiorari. 544 U. S. ___ (2005).

II

We assume that under the applicable state law a person injured by tripping over a package or bundle of papers negligently left on the porch of a residence by a private party would have a cause of action for damages. See 28 U. S. C. §§1346(b)(1), 2674. The question is whether, when mail left by the Postal Service causes the slip and fall, the §2680(b) exception for "loss, miscarriage, or negligent transmission of letters or postal matter" preserves sovereign immunity despite the FTCA's more general statements of waiver.

If considered in isolation, the phrase "negligent transmission" could embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination. See, *e.g.*, Webster's Third New International Dictionary 2429 (1971) (defining "transmission" as "an act, process, or instance of transmitting" and "transmit" as "to cause to go or be conveyed to another person or place"). In large part this inference—transmission includes delivery—led the District Court and Court of Appeals to rule for the Government. See 377 F. 3d, at 288; App. to Pet. for Cert. 5a–6a. The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude both context and precedent require a narrower reading, so that "negligent transmis-

sion" does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address. See *Raila, supra*, at 121 (holding the postal exception covers "damages and delay of the postal material itself and consequential damages therefrom"). The phrase does not comprehend all negligence occurring in the course of mail delivery.

Starting with context, the words "negligent transmission" in §2680(b) follow two other terms, "loss" and "miscarriage." Those terms, we think, limit the reach of "transmission." "[A] word is known by the company it keeps"—a rule that "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961); see also *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning" (internal quotation marks omitted)). Here, as both parties acknowledge, mail is "lost" if it is destroyed or misplaced and "miscarried" if it goes to the wrong address. Since both those terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if "negligent transmission" swept far more broadly to include injuries like those alleged here—injuries that happen to be caused by postal employees but involve neither failure to transmit mail nor damage to its contents.

Our interpretation would be less secure were it not for a precedent we deem to have decisive weight here. We refer to *Kosak* v. *United States*, 465 U. S. 848 (1984). In *Kosak*, an art collector alleged in an FTCA suit that artworks he owned were damaged when the United States Customs Service seized and detained them. *Id.*, at 849–850. The question was whether the Government retained immunity based on §2680(c), a provision that has since been amended but at the time covered:

> "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." *Id.*, at 852, n. 6 (internal quotation marks omitted).

In its opinion concluding the exception did apply and thus that the United States retained sovereign immunity, the Court gave specific consideration to the postal exception. In a part of the opinion central to its holding, the Court contrasted what it called the "generality of §2680(c)" with the "specificity of §2680(b)," *id.*, at 855. The Court observed:

> "One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault. In order to ensure that §2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, 'the loss, miscarriage, or negligent transmission of letters or postal matter'—thereby excluding, by implication, negligent handling of motor vehicles." *Ibid.*

In the present case neither party suggests *Kosak*'s conclusion regarding negligent operation of postal motor vehicles should be ignored as dictum. In light of *Kosak*'s discussion, we cannot interpret the phrase "negligent transmission" in §2680(b) to cover all negligence in the course of mail delivery. Although postal trucks may well be delivering—and thus transmitting—mail when they collide with other vehicles, *Kosak* indicates the United States, nonetheless, retains no immunity.

Seeking to distinguish postal auto accidents from Dolan's fall, the Government argues that negligent driving relates only circumstantially to the mail, whereas Dolan's accident was caused by the mail itself. Nothing in the statutory text supports this distinction. Quite the contrary, if placing mail so as to create a slip-and-fall risk constitutes "negligent transmission," the same should be true of driving postal trucks in a manner that endangers others on the road. In both cases the postal employee acts negligently while transmitting mail. In addition, as the Second Circuit recognized and as the Government acknowledged at oral argument, focusing on whether the mail itself caused the injury would yield anomalies, perhaps making liability turn on whether a mail sack causing a slip-and-fall was empty or full, or whether a pedestrian sideswiped by a passing truck was hit by the side-view mirror or a dangling parcel. See *Raila*, 355 F. 3d, at 122–123.

We think it more likely that Congress intended to retain immunity, as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address. Illustrative instances of the exception's operation, then, would be personal or financial harms arising from nondelivery or late delivery of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice) or from negligent handling of a mailed parcel (*e.g.*, shattering of shipped china). Such harms, after all, are the sort primarily identified with the Postal Service's function of transporting mail throughout the United States.

Resisting this conclusion, the Government emphasizes the Postal Service's vast operations—the 660 million daily mailings and 142 million delivery points mentioned at the outset. See Brief for Respondents 36. As delivery to mailboxes and doorsteps is essential to this nationwide

undertaking, Congress must have intended, the Government asserts, to insulate delivery-related torts from liability. If, however, doorstep delivery is essential to the postal enterprise, then driving postal trucks is no less so. And in any event, while it is true "[t]he §2680 exceptions are designed to protect certain important governmental functions and prerogatives from disruption," *Molzof* v. *United States*, 502 U. S. 301, 311 (1992), the specificity of §2680(b), see *Kosak*, 465 U. S., at 855, indicates that Congress did not intend to immunize all postal activities.

Other FTCA exceptions paint with a far broader brush. They cover, for example: "[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system," 28 U. S. C. §2680(i); "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," §2680(j); "[a]ny claim arising in a foreign country," §2680(k); "[a]ny claim arising from the activities of the Tennessee Valley Authority," §2680(*l*), or "the Panama Canal Company," §2680(m); and "[a]ny claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives," §2680(n). Had Congress intended to preserve immunity for all torts related to postal delivery—torts including hazardous mail placement at customer homes—it could have used similarly sweeping language in §2680(b). By instead "carefully delineat[ing]" just three types of harm (loss, miscarriage, and negligent transmission), see *Kosak*, *supra*, at 855, Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery.

Further supporting our interpretation, losses of the type for which immunity is retained under §2680(b) are at least to some degree avoidable or compensable through postal registration and insurance. See United States Postal Service, Domestic Mail Manual pt. 609.1.1 (Nov. 10, 2005),

available at http://pe.usps.gov/text/dmm300/609.htm (as visited Jan. 9, 2006, and available in Clerk of Court's case file) (allowing indemnity claims for loss or damage of "insured, collect on delivery (COD), registered with postal insurance, or Express Mail"); 39 CFR §111.1 (2005) (incorporating by reference the Domestic Mail Manual). The same was true when Congress enacted the FTCA in 1946. See 39 U. S. C. §245 (1940 ed. and Supp. V) (setting rates and conditions for mail insurance); 39 U. S. C. §381 (1946 ed.) ("For the greater security of valuable mail matter the Postmaster General may establish a uniform system of registration, and as a part of such system he may provide rules under which the senders or owners of any registered matter shall be indemnified for loss, rifling, or damage thereof in the mails . . ."). As *Kosak* explains, one purpose of the FTCA exceptions was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available," 465 U. S., at 858—an objective consistent with retaining immunity as to claims of mail damage or delay covered by postal registration and insurance. While the Government suggests other injuries falling outside the FTCA are also subject to administrative relief, even assuming that is true the provision the Government cites permits only discretionary relief, not an automatic remedy like postal insurance. See 39 U. S. C. §2603 (indicating the Postal Service "may adjust and settle" personal-injury and property-damage claims "not cognizable" under the FTCA's administrative relief provision); see also 31 U. S. C. §224c (1940 ed.) (indicating that "[w]hen any damage is done to person or property by or through the operation of the Post Office Department . . . the Postmaster General is invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not exceed $500"); Legislative Reorganization Act of 1946, §424(a), 60 Stat. 846–847 (repealing §224c as to negligence claims cognizable under the FTCA).

The Government raises the specter of frivolous slip-and-fall claims inundating the Postal Service. It is true that, in addition to other considerations we have identified, *Kosak* describes "avoiding exposure of the United States to liability for excessive or fraudulent claims" as a principal aim of the FTCA exceptions, 465 U. S., at 858. Slip-and-fall liability, however, to the extent state tort law imposes it, is a risk shared by any business that makes home deliveries. Given that "negligent transmission," viewed in context and in light of *Kosak*, cannot sweep as broadly as the Government claims, ordinary protections against frivolous litigation must suffice here, just as they do in the case of motor vehicle collisions.

Finally, it should be noted that this case does not implicate the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane* v. *Peña*, 518 U. S. 187, 192 (1996). As *Kosak* explains, this principle is "unhelpful" in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," 465 U. S., at 853, n. 9, which "waives the Government's immunity from suit in sweeping language," *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547 (1951); *see also United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) (observing "[w]e have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the [FTCA]" (quoting *Yellow Cab Co., supra*, at 547)). Hence, "the proper objective of a court attempting to construe one of the subsections of 28 U. S. C. §2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak, supra*, at 853, n. 9 (quoting *Dalehite* v. *United States*, 346 U. S. 15, 31 (1953)). Having made that inquiry here, we conclude Dolan's claims fall outside §2680(b).

* * *

The postal exception is inapplicable, and Dolan's claim falls within the FTCA's general waiver of federal sovereign immunity. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

No. 04–848

BARBARA DOLAN, PETITIONER *v.* UNITED STATES POSTAL SERVICE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 22, 2006]

JUSTICE THOMAS, dissenting.

The Federal Tort Claims Act (FTCA) waives the Government's sovereign immunity for civil suits seeking money damages

> "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U. S. C. §1346(b)(1),

save several exceptions found in §2680. As relevant here, Congress reserved to the Government its sovereign immunity respecting "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." §2680(b) (postal exception).

Petitioner Barbara Dolan claims to have suffered personal injuries when she tripped over letters, packages, and periodicals that an employee of the United States Postal Service (Postal Service) negligently left on her porch. Today, the Court concludes that Dolan's lawsuit may proceed because her claim does not fall within the exception. I disagree. Dolan's claim arises out of the Postal

Service's "negligent transmission" of mail and is thus covered by the terms of the postal exception. Even if the exception is ambiguous, this Court's cases require that ambiguities as to the scope of the Government's waiver of immunity be resolved in its favor. Accordingly, I respectfully dissent.

I

The text of the postal exception, and every term therein, should be ascribed its ordinary meaning. See *FDIC* v. *Meyer*, 510 U. S. 471, 477 (1994) (noting that we interpret a statutory term in accordance with its ordinary meaning when that term is not defined in the statute). The term in controversy here is "negligent transmission." The crux of my disagreement with the majority is its failure to assign the term "transmission" its plain meaning. That term is defined as the "[a]ct, operation, or process, of transmitting." Webster's New International Dictionary 2692 (2d ed. 1934, as republished 1945). "Transmit" is defined as, *inter alia*, "[t]o send or transfer from one person or place to another; to forward by rail, post, wire, etc., . . . [t]o cause . . . to pass or be conveyed." *Id.*, at 2692–2693. There is no cause to conclude that Congress was unaware of the ordinary definition of the terms "transmission" and "transmit" when it enacted the FTCA and the postal exception in 1946. Nor is there textual indication that Congress intended to deviate from the ordinary meaning of these terms.[1] Accordingly, I would interpret the term

[1] In fact, this reading is supported by Congress' routine definitional use of the terms "transmission" and "transmit" in both criminal and civil postal statutes to refer to the handling, processing, and delivery of mail to a final destination. See, *e.g.*, Act of Mar. 3, 1845, ch. 43, §6, 5 Stat. 734 (respecting deputy postmasters authorized "to transmit to any person or place" official letters or packages free of charge); 18 U. S. C. §§1696(b) and (c) (referring to unlawful "transmission" of letters); §§1716(b), (c), (d), and (e) (regulating and proscribing "transmission in the mails" of dangerous items (*e.g.*, medicines) except when the "trans-

"transmission" consistent, with its ordinary meaning, see *ante*, at 4, and conclude that the postal exception exempts the Government from liability for *any* claim arising out of the negligent delivery of the mail to a Postal Service patron, including Dolan's slip-and-fall claim.

Rejecting the "ordinary meaning and usage" of "negligent transmission," the majority concludes that the term covers only injury arising "directly or consequentially" from "negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address." *Ante*, at 5, 7. Thus, in the majority's view, "negligent transmission" covers direct injury to the mail as well as personal injury arising from injury to the mail, but does not cover personal injury that does not arise from damage to the mail. For example, in the majority's view, if a mail carrier negligently drops a mailbox containing glassware on a patron's doorstep, causing the contents to shatter, and the patron later injures himself while attempting to handle the shards of glass, the postal exception would bar a claim for damages for the destroyed item as well as a related claim for personal injury. That view is correct, as far as it goes. However, under the majority's view, if the mail carrier negligently places a heap of mail on a patron's front porch and the patron trips and falls over the mail as he walks out of his front door, his personal injury claim may go forward. There is no basis in the text for the line drawn by the majority. Indeed, the majority's view is at odds with the broad language of the postal exception, which expressly applies to "*[a]ny claim* arising out of . . . negligent transmission of letters or postal matter." §2680(b) (emphasis added).

The majority rationalizes its view by concluding that the terms "loss" and "miscarriage" necessarily limit the term "transmission." *Ante*, at 5. Applying the rule of *noscitur a*

---

mission" is "to," "from," or "between" specified individuals or entities).

*sociis*—that a word is known by the company it keeps—the majority reasons that because both "loss" and "miscarriage" refer to "failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if 'negligent transmission' swept more broadly." *Ibid.* But there is nothing "odd" about interpreting the term "negligent transmission" to encompass more ground than the decidedly narrower terms "loss" and "miscarriage."

The rule of *noscitur a sociis* is intended to prevent ascribing to one word a meaning so expansive that it conflicts with other terms of the provision in a manner that gives "'unintended breadth to an Act of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)). That rule, however, "does not require [the Court] to construe every term in a series narrowly because of the meaning given to just one of the terms," where, as here, nothing in the text demands a more limited construction. *Gustafson, supra,* at 586 (THOMAS, J., dissenting) (emphasis deleted). Indeed, to read Congress' use of narrow terms in a list as limiting the meaning of broad terms in the same list "would defy common sense; doing so would prevent Congress from giving effect to expansive words in a list whenever they are combined with one word with a more restricted meaning." *Id.*, at 587.

Nor does this Court's opinion in *Kosak* v. *United States*, 465 U. S. 848 (1984), support the majority's narrow construction of the postal exception. In *Kosak*, this Court suggested that the postal exception does not apply to suits arising from the negligent handling of motor vehicles by Postal Service employees. Specifically, the Court stated that:

> "One of the principal purposes of the [FTCA] was to waive the Government's immunity from liability for injuries resulting from *auto accidents* . . . . In order to

> ensure that §2680(b) . . . did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, 'the loss, miscarriage, *or* negligent transmission of letters or postal matter'. . . . *Id.*, at 855 (emphasis added).

That observation has no import beyond the recognition that the postal exception—whatever its scope may be—was carefully crafted so as not to undermine an undisputed principal purpose of the FTCA—to waive the Government's immunity for injuries arising from *auto accidents*. It says nothing further about the acts Congress intended to capture when enacting the postal exception, and, thus, is unremarkable for purposes of construing the exception. [2]

---

[2] In an attempt to reconcile *Kosak* with this case, the majority argues that "one purpose of the FTCA exceptions was to avoid 'extending coverage of the Act to suits for which adequate remedies were already available,' . . . an objective consistent with retaining immunity as to some claims of mail damage or delay covered by postal registration and insurance." *Ante*, at 9 (quoting *Kosak*, 465 U. S., at 858). The majority, however, ignores the fact that, in most cases, such insurance covers only the sender, not the recipient, in which case recipients have no means of obtaining compensation for loss or damage to money, gifts, heirlooms, valuable papers, delayed medicine, or time-sensitive documents. See United States Postal Service, Mailing Standards of the United States Postal Service, Domestic Mail Manual, §§609.4.3(f) and (ae), pp. 1129, 1130 (rev. Jan. 6, 2005). The majority's justification also fails to take into account the fact that postal patrons cannot insure against the loss of items of sentimental value. See *id.*, §609.4.3, generally. With a more accurate depiction of registration and insurance coverage in hand, the Government's claim that, like injuries arising from negligent transmission of mail, other injuries outside the reach of the FTCA are also amenable to administrative relief is not so easily dismissed. *Ante*, at 9. Specifically, 39 U. S. C. §2603, as the Government argues, provides for the settlement of claims, within the discre-

Even if *Kosak* does inform the outcome in this case, it does not support the majority's interpretation of "negligent transmission." As discussed above, the majority does not purport to limit the type of negligent *act* that may fall under the postal exception; rather it limits the scope of the exception based on the type of *consequence* that the negligent act causes (damage to the mail, late delivery, etc.) But *Kosak*'s exclusion of the *act* of negligent driving—regardless of whether the *consequence* of that act is damage to the mail or injury to a person—from the scope of the postal exception implies, if anything, that the *Kosak* Court envisioned discrete *acts* as being covered, independently of the nature of their consequences. See 465 U. S., at 855 (excluding "negligent handling of motor vehicles" from the "types of misconduct" for which liability is barred by the postal exception). As such, *Kosak* does not support an interpretation of "negligent transmission" based upon the type of injury that is caused by the Postal Service's negligent handling of the mail.

II

Assuming that the postal exception is ambiguous, as the majority suggests, see *ante*, at 4–5, settled principles governing the interpretation of waivers of sovereign immunity require us to rule in favor of the Government.

A court may only exercise jurisdiction over the Government pursuant to "a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 472

---

tion of the United States, for injuries caused by the Postal Service that are not otherwise cognizable, which would include claims like Dolan's. The discretionary nature of such settlements does not alter the fact that §2603 undermines the Court's position that the purported unavailability of administrative recovery for claims such as Dolan's supports its proposed interpretation.

(2003). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U. S. 187, 192 (1996). These settled legal principles apply not only to the interpretation of the scope of the Government's waiver of immunity, but also to the interpretation of the scope of any exceptions to that waiver. See *ibid.* (explaining that, consistent with rules of construction respecting waivers of sovereign immunity, ambiguities created by conditions on and qualifications of the waiver must be strictly construed in favor of sovereign immunity).

Thus, the majority is incorrect to conclude that "this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Ante*, at 10. As this case clearly illustrates, the Government's amenability to suit can only be ascertained after construing both the waiver of immunity and its exceptions. The well-established rationale for construing a waiver in favor of the sovereign's immunity, thus, applies with equal force to the construction of an exception to that waiver. Accordingly, even if I were to conclude that the majority's interpretation of "negligent transmission" were as plausible as my own, I would still resolve this case in favor of the Government's sovereign immunity as mandated by our canons of construction.[3]

---

[3]There is no canon of construction that counsels in favor of construing the ambiguity against the Government. Although we have "on occasion narrowly construed exceptions to waivers of sovereign immunity," we have done so in cases where Congress plainly waived the Government's immunity for the particular claim at issue, and the only question before the Court was the permissibility of the form of the suit. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) (citing *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951), and *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366 (1949)). In cases where, as here, the question whether a particular claim is subject to an exception is disputed, we have construed FTCA exceptions broadly to

* * *

For these reasons, I would hold that a tort claim for personal injury arising out of negligent delivery of mail to a postal patron is barred by 28 U. S. C. §2680(b), the postal exception. Accordingly, I would affirm the judgment of the Court of Appeals.

---

preclude claims for actions Congress intended to except from the FTCA's general waiver of immunity. See *Dalehite* v. *United States*, 346 U. S. 15, 31 (1953); *United States* v. *Orleans*, 425 U. S. 807 (1976); *Kosak* v. *United States*, 465 U. S. 848 (1984).